

**COMPARISON OF RAHN CONCEPT BETWEEN COMPILATION OF
SHARIA ECONOMIC LAW AND MAJALLAH AL AHKÂM**

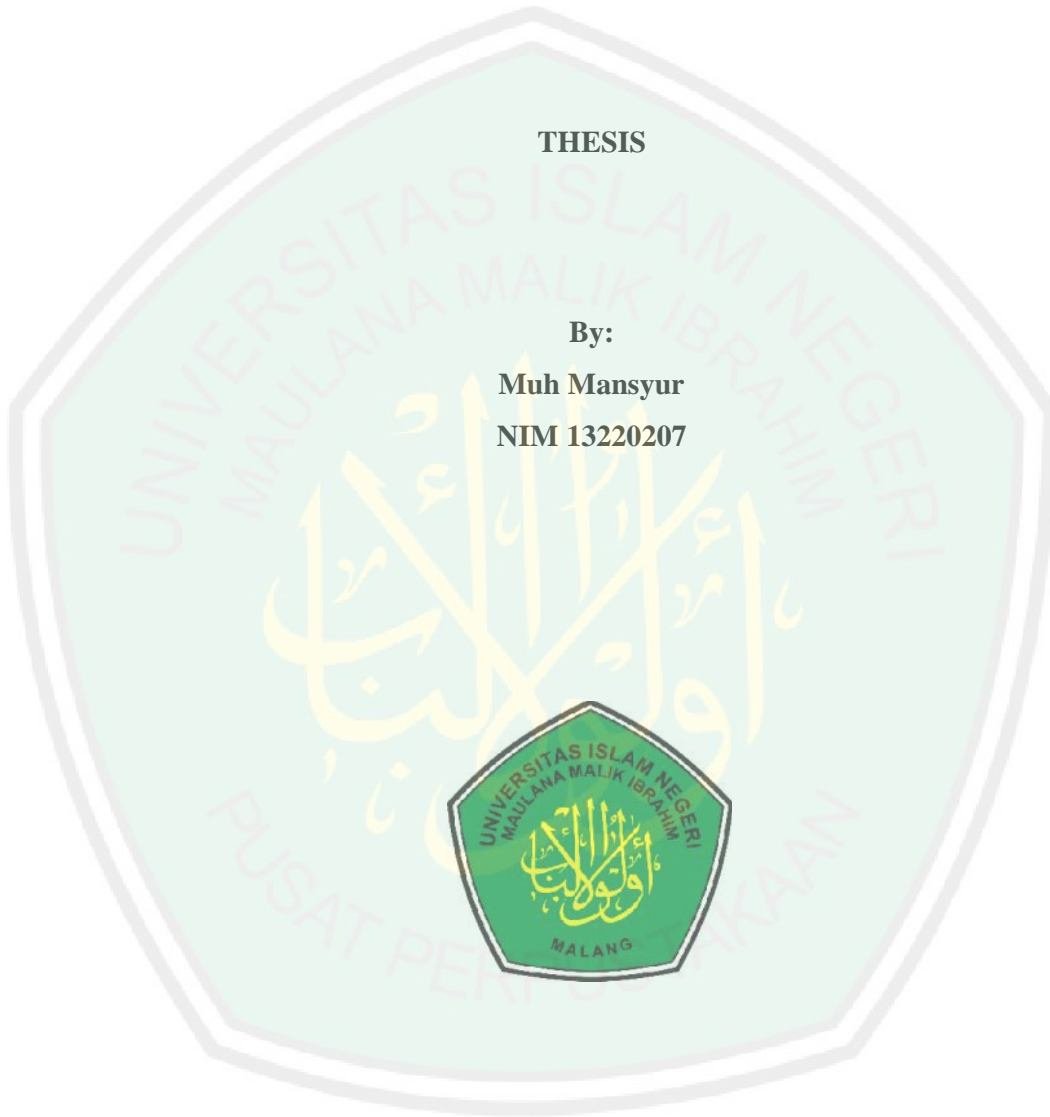
AL 'ADLIYYAH

THESIS

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**ISLAMIC ECONOMY LAW DEPARTMENT
SHARIA FACULTY
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STATE ISLAMIC UNIVERSITY MALANG
2017**

**COMPARISON OF *RAHN* CONCEPT BETWEEN COMPILATION OF
SHARIA ECONOMIC LAW AND *MAJALLAH AL AHKÂM*
AL ‘ADLIYYAH**

THESIS

Presented to
Sharia Faculty of State Islamic University of Maulana Malik Ibrahim of Malang
To Fill One of Requirements Used to Get Degree of
Bachelor Islamic Law (S.H)

By:

Muh Mansyur

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**SHARIA BUSINESS LAW DEPARTMENT
SHARIA FACULTY
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2017

STATEMENT OF THE AUNTENTICITY

In the name of Allah,

With conciousness and responsibility toward the development of science, the author declares that the thesis entitled:

COMPARISON OF *RAHN* CONCEPT BETWEEN COMPILATION OF SHARIA ECONOMIC LAW AND *MAJALLAH AL AHKÂM* AL 'ADLIYYAH

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Malang, 31th of March 2017

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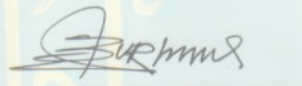
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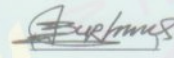
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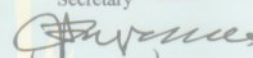
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MOTTO

وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانَ مَقْبُوضَةً

"And if you are on a journey and cannot find a scribe, then a security deposit (should be) taken"



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All praise due to Allah, the Cherisher and Sustainer of all the worlds. There is neither might nor power but with Allah the Great, the Exalted. With only His Grace and Guidance, this thesis entitled “Comparison Of *Rahn* Concept Between Compilation of Sharia Economic Law And *Majallah Al Ahkâm Al ‘Adliyyah*” could be completed, and also with His benevolence and love, peace and tranquility of the soul. Peace be upon the Prophet Muhammad (saw) who had brought us from darkness into the light, in this life. May we be together with those who believe and receive intercession from Him in the day of Judgement. Amîn.

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3. Dr. H. Mohamad Nur Yasin, S.H, M. Ag., as the head of Sharia Business Law Department of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim Malang.
4. Mr. Burhanuddin S, S.HI., M.Hun, as the thesis supervisor. The author expresses his gratitude for the guidance and directional motivation given in the course of completing this thesis. May Allah (swt) shower him and his family with His blessings.
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Hopefully, by imparting what has been learned during the course of study in the Faculty of Sharia of State Islamic University, Maulana Malik Ibrahim Malang, it will benefit all readers and the author himself. Realizing the fact that error and weakness is impartial to being human, and that this thesis is still far from perfection, the author appreciates constructive criticism and suggestions for the improvement and betterment of this thesis.

Malang, 31th of March 2017
Author,

Muh Mansyur
NIM 13220207

B. Vocal, long and Diftong

In every written Arabic text in the *latin* form, its vowels *fathah* is written with “a”, *kasrah* with “i”, and *dlommah* with “u”, where as elongated vowels are written such as:

Elongated (a) vowel = *ā* for example قِيلَ becomes *qā ilā*

Elongated (i) vowel = *ī* for example قِيلَ becomes *qī ilā*

Elongated (u) vowel = *ū* for example قِيلَ becomes *du nā*

Specially for the pronouncing of *ya'nisbat* (in association), it cannot be represented by “i”, unless it is written as “iy” so as to represent the *ya'nisbat* at the end. The same goes for sound of a diftong, *wawu* and *ya'* after *fathah* it is written as “aw” or “ay”. Study the following examples:

Diftong (aw) = قَوْلٌ becomes *qawlun*

Diftong (ay) = خَيْرٌ becomes *khayrun*

C. Ta' marbu *thah* ()

Ta' marbûthah is transliterated as “t” if it is in the middle of word, but if it is *Ta' marbûthah* at the end, then it is transliterated as “h”. For example:

It will be *al-risalat lial-mudarrisah*, or if it happens to be in the middle of a phrase which constitutes *mudlaf* and *mudlaf ilayh*, then the transliteration will be using “t” which is enjoined with the previous word, for example *firahmatillah* becomes *firahmatillah*.

D. Definite Article

Arabic has only one article, “al” () and it written in small letters, unless at the beginning of word while “al” in the pharase of lafadh jalalah (speaking of God) which is in the middle of a sentence and supported by and (idhafah), then it is not written. Study the following:

1. Al-Ima m al-Bukha riy said....
2. Al-Bukha riy explains in the prologue of his book....
3. *Masya ’ Alla h ka na wa ma lam yasya’ lam yakun.*
4. *Billa h ‘azza wa jalla*



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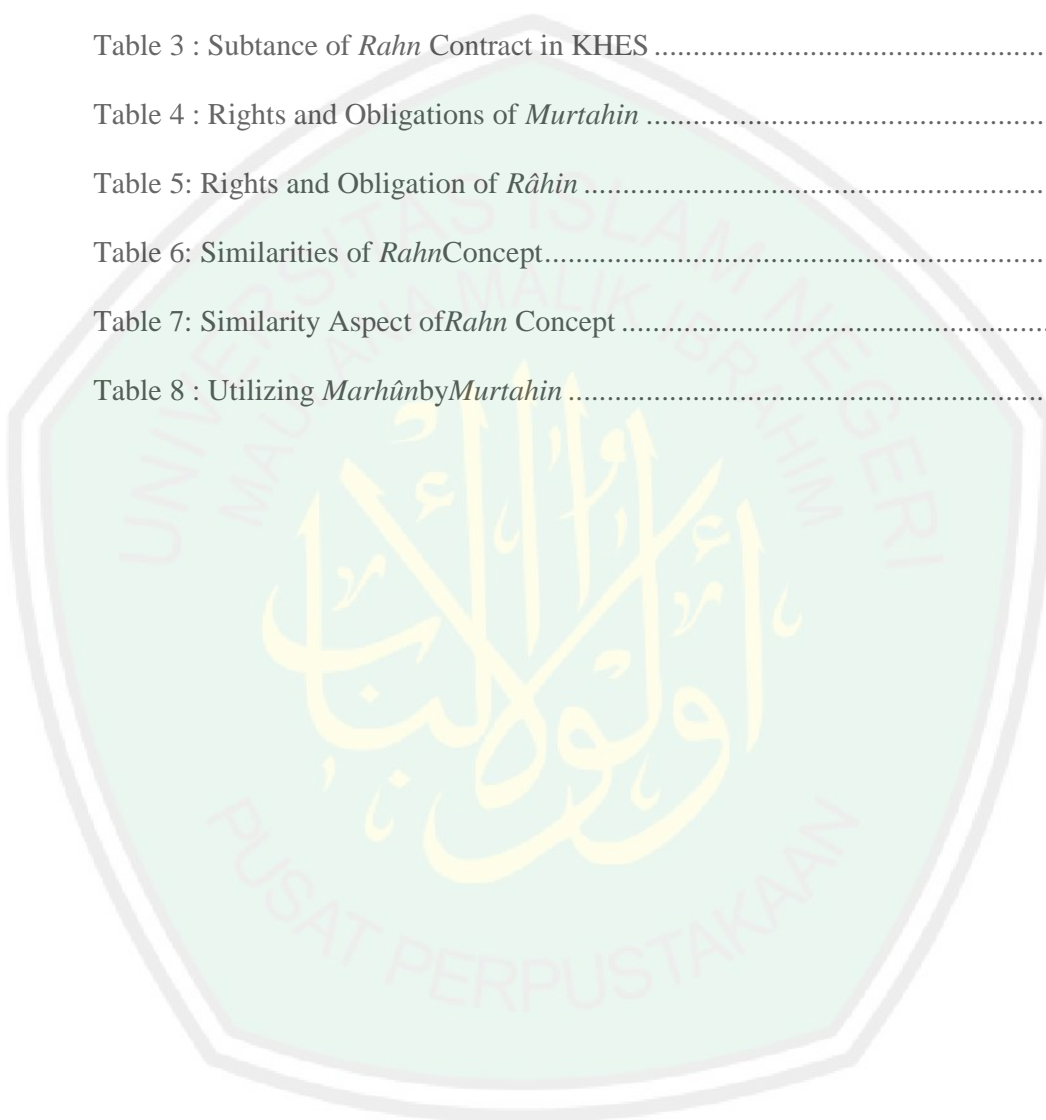
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ABSTRAK

Muh. Mansyur, 13220207, *Perbandingan Konsep Rahn Antara Kompilasi Hukum Ekonomi Syari'ah dan Majallah al Ahkâm al 'Adliyyah*. Skripsi, Jurusan Hukum Bisnis Syari'ah Fakultas Syari'ah, Universitas Islam Negeri (UIN) Maulana malik Ibrahim Malang, Pembimbing: Burhanuddin Susamto, S.HI., M.Hum.

Kata Kunci: *Rahn*, Kompilasi Hukum Ekonomi Syari'ah, *Majallah al Ahkâm al 'Adliyyah*

Kenyataan bahwa ekonomi syariah dewasa ini semakin berkembang di Indonesia. Perkembangan bidang ekonomi syariah tersebut diiringi dengan perkembangan pada aspek regulasinya. Salah satu regulasi yang mengatur tentang ekonomi syariah adalah Peraturan Mahkamah Agung Nomor 2 Tahun 2008 Tentang Kompilasi Hukum Ekonomi Syariah (KHES). KHES banyak mengandung tentang akad-akad berbasis syariah, salah satunya adalah akad rahn. Konsep rahn dalam KHES dibentuk dengan merujuk pada kitab-kitab *fiqh mu'amalah*, fatwa DSN-MUI termasuk *Majallah al Ahkâm al 'Adliyyah* yang merupakan kompilasi hukum Islam pertama di dunia yang dikeluarkan pada masa Turki Utsmani. Akad *rahn* yang disusun dalam KHES ternyata memiliki perbedaan konsep dengan akad *rahn* pada *fiqh mu'amalah* klasik. Oleh karenanya peneliti tertarik untuk melakukan penelitian dengan membandingkan KHES dengan *Majallah al Ahkâm al 'Adliyyah*.

Dalam penelitian ini, terdapat dua rumusan masalah yaitu: 1) Bagaimana konsep akad *rahn* dalam Kompilasi Hukum Ekonomi Syari'ah dan *Majallah al Ahkâm al 'Adliyyah*? 2) Bagaimana persamaan dan perbedaan konsep *rahn* antara Kompilasi Hukum Ekonomi Syari'ah dan *Majallah al Ahkâm al 'Adliyyah*? Penelitian ini merupakan jenis penelitian hukum normatif dengan menggunakan pendekatan pendekatan perundang-undangan (*statute approach*) dan perbandingan (*comparison approach*). Adapun metode analisis data yang dipakai dalam penelitian ini adalah analisis data deskriptif kualitatif.

Hasil penelitian ini menunjukkan bahwa akad *rahn* dalam KHES dan *Majallah al Ahkâm al 'Adliyyah* terdapat persamaan dan perbedaan. Persamaan di antara kedua kodifikasi hukum tersebut, yaitu: a) penambahan dan penggantian *marhûn*; b) pembatalan akad *rahn*; c) *rahn* harta pinjaman; d) hak dan kewajiban dalam akad *rahn*; e) meminjamkan *marhûn* melalui kesepakatan; f) penyimpanan *marhûn*; dan g) penjualan *marhûn*. Sedangkan perbedaan dalam KHES dan *Majallah al Ahkâm al 'Adliyyah* meliputi beberapa hal, yaitu: a) rukun akad *rahn*; b) Akad yang digunakan dalam pegadaian; c) Syarat '*âqidain*'; dan d) pembiayaan *marhûn*.

ABSTRACT

Muh. Mansyur, 13220207, *Comparison of Rahn Concept Between Compilation of Sharia Economic Law And Majallah al Ahkâm al ‘Adliyyah*. Thesis, Department of Sharia Business Law, Sharia Faculty, The State Islamic University (UIN) Maulana Malik Ibrahim of Malang, Supervisor: Burhanuddin Susanto, S.HI., M.Hum.

Keywords: *Rahn*, Compilation of Sharia Economic Law , *Majallah al Ahkâm al ‘Adliyyah*

The fact that sharia economy is growing in Indonesia nowadays. The development of sharia economy followed with the development of regulation aspect. One of the regulations that regulates about sharia economy is Rule of The Supreme Court (PERMA) Number 2 of 2008 About Compilation of Sharia Economic Law (KHES). KHES contains a lot of contracts based on Sharia, one of them is *rahn* contract. The concept of *rahn* in KHES formed by referencing to the books of *fiqh mu’amalah*, *fatwa* of DSN-MUI, including *Majallah al Ahkâm al ‘Adliyyah* which is a the first Islamic law compilation in the world issued during the time of Ottoman Turkey. Actually, the *rahn* contract drawn up in KHES has different concept with *rahn* contract in *Majallah al Ahkâm al ‘Adliyyah*. Therefore, the researcher is interested in doing research to compare KHES with *Majallah al Ahkâm al ‘Adliyyah*.

In this research, there are two statement of problems: 1) how is the concept of *rahn* contract in Compilation of Sharia Economic Law and *Majallah al Ahkâm al ‘Adliyyah*? 2) How are similarities and differences between KHES and *Majallah al Ahkâm al ‘Adliyyah*? This kind of research is a of normative legal research using statute approach and comparison approach. As for the method of data analysis used in this research is descriptive qualitative data analysis.

The results of this research indicates that *rahn* contract in KHES and *Majallah al Ahkâm al ‘Adliyyah* there are similarities and differences. The similarities between both of law codifications are: a) the addition and replacement of *marhûn*; b) cancellation of *rahn* contract; c) *rahn* of property loan; d) right and obligation in *rahn* contract; e) lending of *marhûn* through the deal; f) *marhûn*'s storage; and g) sale of *marhûn*. While the difference in KHES and *Majallah al Ahkâm al ‘Adliyyah* includes a few things, namely: a) pillar of *rahn* contract; b) using of contract in pawnshop; c) ‘*âqidain* requirement; and d) *marhûn* financing.

ملخص البحث

محمد منشور، 13220207، المقارنة في الرهن بين مجموعة الأحكام الإقتصادية الشرعية والمجلة الأحكام العدلية، البحث العلمي، بحث جامعي، كلية الشريعة، شعبة الحكم الإقتصادي الشرعي، جامعة الإسلامية الحكومية مولانا مالك إبراهيم مالانج. المشرف: برهان الدذن سوسانطا الماجستير.

الكلمات الرئيسية: الرهن، مجموعة الأحكام الإقتصادية الشرعية، المجلة الأحكام العدلية

كان الإقتصاد الإسلامي يتطور في الواقع تطورا سريعا هذا الزمن، وهذا التطور يجري بجران القانون المتعلق له. وأحد القانون الذي ينظم الإقتصاد الشرعي هو قانون محكمة العظ نمرة 2 2008 في مجموعة الأحكام الإقتصادية الشرعية (KHES). وكانت مجموعة الأحكام الإقتصادية الشرعية تشمل العقود الشرعية، منها الرهن. ويتكون عقد الرهن في مجموعة الأحكام الإقتصادية الشرعية من فقه المعاملات، والفتاوى في هيئة الشرعية القومية لمجلس العلماء الإندونيسي (DSN-MUI)، وكذلك مجلة الأحكام العدلية التي تكون مجموعة الأحكام الأولى في الدنيا، وتخرجها حكومة التركي العثمانية. قد وجد الاختلاف في عقد الرهن الذي تؤلفه مجموعة الأحكام الإقتصادية الشرعية والرهن في المجلة الأحكام العدلية. لأجل ذلك، يحرك الباحث للبحث المقارن عن الرهن في مجموعة الأحكام الإقتصادية الشرعية والمجلة الأحكام العدلية.

يشتمل هذا البحث مشكلتين، الأولى كيف عقد الرهن في مجموعة الأحكام الإقتصادية الشرعية والمجلة الأحكام العدلية؟ والثانية كيف وجه الاختلاف والإتفاق بين عقد الرهن في مجموعة الأحكام الإقتصادية الشرعية والمجلة الأحكام العدلية؟. وهذا البحث من الأبحاث المعيارية (library research) ويستخدم منهج القانون (statute approach) فحج المقارنة (comparative approach). ويستخدم منهج تحليل البيانات الوصفية النوعية.

حاصل البحث قد وجدت أوجه الاختلاف والإتفاق في عقد الرهن بين مجموعة الأحكام الإقتصادية الشرعية والمجلة الأحكام العدلية. والإتفاق بينهما هو، أ) الزيادة والبدل في المرهون، ب) إبطال الرهن، ت) الرهن في المال المستعار، ج) الحق والواجب في عقد الرهن، د)

إجارة المرهون بالإتفاق، ه) وتخزين المزهزن، و) بيع المرهون. وأماالإختلاف بينهما في الرهن فهو، أ) أركان الرهن، ب) العقد المستعمل في الرهن، ج) شروط العاقدين، د) تمويل المرهون.





CHAPTER I

INTRODUCTION

A. Background of Research

Human is a social creature (*zoon politicon*). Human is unable to live alone, because they need each other. To meet the needs of human life, people make a variety of interactions between an individual with the other, such as cooperation, help each other etc. With satisfying human needs through interactions as above, then human being can carry out his duty to Allah Swt, as khalifa on the earth. One of the form of interaction in society practice is *rahn* contract. *Rahn* is contract transactions based on help each other (*ta'awun*), that goods mastery belongs to the borrower by the lender as collateral.² It is described in the word of God in Q. S Al-Baqarah 283, namely:

²Article 20 Verse (14) Chapter I About General Provision at Book II About Contract, Compilation of Sharia Economic Law.

وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانَ مَقْبُوضَةٍ فَإِنْ أَمِنَ بَعْضُكُمْ
بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ
يَكْتُمْهَا فَإِنَّهُ آتَمٌ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

*“And if you are on a journey and cannot find a scribe, then a security deposit (should be) taken. And if one of you entrusts another, then let him who is entrusted discharge his trust (faithfully) and let him fear Allah, his Lord. And do not conceal testimony, for whoever conceals it - his heart is indeed sinful, and Allah is knowing of what you do”.*³

In the context of Indonesia, *rahn* contract also arranged in a compilation of law i.e. Compilation of Sharia Economic Law that acts in accordance with the rule of the Supreme Court of the Republic of Indonesia (PERMA) number 2 year 2008 About the Compilation of Sharia Economic Law (KHES). KHES has a lot of load on the contracts of Sharia that are taken from different view of *madzhâb* which is expected to be able to help and support the performance of the Religious Court judges in handling the issue of Sharia economy dispute that became the new authority of the Religion Judicial. If it's seen carefully, KHES nearly 80% contains about contracts.⁴ Because the compilers of KHES seemed realize very well that enforceability of KHES is not intended for a short time. Therefore, KHES contains a lot of principles of shariaeconomy and the way of settlement of the dispute, without leaving the detail rules. Unlike the Bench Book in other countries are more likely to set up a procedural legal, KHES completely contains material law.⁵

³Al Qur'an: Al Baqarah: 283.

⁴Abdurrahman, *Hukum Perjanjian Syariah di Indonesia (Studi Komparatif tentang KHES, Fiqh Muamalah dan KUHPerdara)*, in *Mimbar Hukum Journal of Islamic Law*, Nomor 66, (Jakarta, 2008), p. 32

⁵Magazine of Peradilan Agama, *KHES Bench Book Hakim Peradilan Agama*, Edition 8, 2015, p. 4

The provision of *rahn* in The Compilation of Sharia Economic Law is in Book Two (II) Chapter XIII about *Rahn*. The provision of *rahn* in KHEs consists of 40 articles i.e. from article 329 until article 369. The articles are divided into several parts, namely the First Part about Pillar and condition; the Second Part about additional and Changing *rahn* goods; the Third Part about Cancellation of *rahn* contract; the Fourth Part about Right and Obligation in *Rahn*; the Fifth Part about Right of *Râhin* and *Murtahin*.; the Sixth Part about *Rahn* Goods Storage; and the Seventh Part about *Rahn* Goods Sale.

Beside the KHEs, there are several legal codifications based on Sharia in the world ever to be used as a guide in doing contract, one of them is *Majallah al Ahkâm al 'Adliyyah*. *Majallah al Ahkâm al 'Adliyyah* is the first of law compilation in the world's based on Sharia formed during the Ottoman Empire. The law Codification motivated of scientists and the biggest *imams* appearance in all corners of regions, so in development of the next comes the sense of *madzhâb* fanaticism that tends to decreasing of *ijtihâd* spirit, stagnancy and the close of *ijtihâd*. This condition implies to the differences in the legal setting due to many various *madzhâb* used. Based on those conditions, then came the idea from the Ottoman Empire to realize the codification of Islamic law so that legal diversity does not occur in one matter on the judiciary. In its arranging *Majallah al Ahkâm al 'Adliyyah* is based on the Hanafi *madzhâb* with attention to people advantages, march of time and view of many *madzhâbs*.

The provision of *rahn* in *Majallah al Ahkâm al 'Adliyyah* appears on the Fifth Book (V) which consists of 60 Article i.e. from 701 until 761 that consists of

preface and 4 Chapters about the determinations of *Rahn*. The chapters on the Fifth Book about the *Rahn: Muqaddimah* contain terms of *fiqh* related to *Rahn*; The first chapter about *Rahn* Contract; The second chapter about *Râhin* and *Murtahin*; The third chapter about *Marhûn*; and the fourth Chapter about the law of *Rahn*.

If it is seen from the establishment elements, both of codification of Islamic law (Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah*) every single of them have their own special characteristics. In the formation of *Majallah al Ahkâm al 'Adliyyah*, adopted some of the Hanafiah *Madzhâb* and made it as the main reference (domination) in the codification. Whereas in the formation of Compilation of Sharia Economic Law, adopted some *madzhâbs* without making one of them as dominator or main *madzhâb*. In fact, the substance, KHES consisting of three (3) books, 39 Chapters, and 790 Articles is organized by referring to various books of *fiqh* including *Majallah al Ahkâm al 'Adliyyah*, *fatwas* of National Sharia Board of Indonesia scholars Assembly (DSN-MUI) and Bank Indonesia Regulation.

Further more, activity of pawnshop based on Islam in Indonesia is not *tabaru'* or alms activity, but rather a form of profit-oriented business. So, in the practice, pawnshop in Indonesia applying some contracts in the pawn transactions, namely: *qardl*, *rahn*, and *ijârah*. *Qardl* contract used in the debt transaction, whereas the *rahn* contract used in underwriting by goods by *râhin* to *murtahin* and *ijârah* contract used in maintenance by pawnshop to the pawn goods. Therefore, the need for a comparison between the concepts firmly between the

pawn in Indonesia with other codification, in this case the researcher specialize to *Majallah al Ahkâm al 'Adliyyah*.

In addition, in the practice of Islamic financial institution in Indonesia there is another transaction related to *rahn* but not described in the Compilation of Sharia Economic Law, that is fiduciary. According to Tri Ayu Riwayani, alumnus of the Sharia Business Law Department, Faculty of Sharia, Islamic State University of Maulana Malik Ibrahim Malang in her theses entitled "Comparative Law Fiduciary Guarantee according to Article No. 42 of 1999 With *Rahn Tasjili* according to *Fatwa* No. 68/DSN-MUI/III/2008", in his conclusion described that fiduciary guarantee in Indonesia if seen from Islam view, it is classified into *rahntasjili*.

In observing into different substances both of Islamic law codifications, and there are several different pawn practice too, therefore it is very important for researcher to research related to such things as "Comparison of *Rahn* Concept between Compilation of Sharia Economic Law with *Majallah al Ahkâm al 'Adliyyah*". The research is become more important because there has been no similar research was made with the theme and the same approach.

B. Statement of Problem

Based on the background of research above, the researcher intend to talk over about some problems, they are:

1. How is the *rahn* concept in Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah*?
2. How are the similarities and differences of *rahn* concept between Compilation of Sharia Economic Law with *Majallah al Ahkâm al 'Adliyyah*?

C. Objective of Research

Based on the statement of problem above, the research that will be held is purposed for:

1. Explaining *rahn* concept in Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah*
2. Explaining the differences of *rahn* concept between Compilation of Sharia Economic Law with *Majallah al Ahkâm al 'Adliyyah*

D. Significance of Research

There are two benefits of this research:

1. Theoretical Benefit
 - a. Increasing to the treasure of knowledge in the field of Islamic law specially concerns of *mu'âmalah* or sharia business law.
 - b. Contributing thoughts for the next researcher who is interested in researching on comparison of compilation of Islamic law, particularly in the field of *mu'âmalah*, especially on the concept of *rahn*.

2. Practical Benefit

- a. In the practical level, the research is expected to provide information to the society who has business to understand the terms of provision of *rahn* in the KHES by comparison against *Majallah al Ahkâm al 'Adliyyah* as a discourse, discussions and information like the Student Faculty of Sharia.

E. Conceptual Definition

1. *Rahn* is goods mastery belongs to the borrower by the lender as collateral
2. The Compilation of Sharia Economic Law (KHES) is a summary of the various legal opinions taken from a variety of books that are written by scholars of *fiqh* which can be used as a reference in religion court to be processed and compiled into a single set. The set is the compilation it self.⁶
3. *Majallah al Ahkâm al 'Adliyyah* is the first book of the Islamic Civil Law that codified in 1293 H/1876 M by the Government of Ottoman Empire.⁷

F. Limitation of Problem

Comparison of concept referred to in this research is a comparison of *rahn* concept in the Compilation of Sharia Economic Law, i.e. the Compilation of Sharia Economic Law in Indonesia and the *Majallah al Ahkâm al 'Adliyyah*, i.e., the compilation of Islamic law during the time of Ottoman Empire as the first compilation of the Islamic law in the world.

⁶Nasrun Harun, *Ensiklopedia Hukum Islam*, (Jakarta: PT. Ichtiar Baru van Hoeve, 2001), p. 968.

⁷Zulkarnain Abdurrahman, "Keberadaan Majallat al-ahkam al-'Adliyah dalam perkembangan hukum Islam", <http://pmi.uinsu.ac.id/berita/read/132/keberadaan-majallat-al-ahkam-al-adliyah-dalam-perkembangan-hukum-islam.html>, accessed on 4th October 2016.

G. Research Method

1. Kind of Research

This research is normative legal research, namely the legal research that discusses the principles of law, legal systematic, vertical and horizontal synchronization level, comparison of law and legal history.⁸ In this study, the researcher is going to discuss about the comparison between KHES with *Majallah al Ahkâm al 'Adliyyah*.

2. Research Approach

In this study, the researcher used two research approaches, namely statute approach and comparative approach. Statute approach is an approach made by studying all legislations and regulations with the relevant legal issues that are being discussed.⁹ The statute approach is used because the object of study here is a KHES which is legitimized by the rule of the Supreme Court No. 2 in 2008 About the Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah* is a compilation of Islamic law during the Turkey Ustmani.

While the comparative approach is research that conducted by comparing a country's legislation with the legislation of one or more other country about the same thing. It can also be compared alongside the legislation judge's adjudication in several countries for the same case. The usefulness of this approach is to

⁸Soerjono Soekanto dan Sri Mamudji, *Penelitian hukum normatif: Suatu Tinjauan Singkat*, (Jakarta: Rajawali Press, 2011), p. 13-14.

⁹Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2011), p. 93.

acquire the similarities and the differences between these laws.¹⁰ In this case, the researcher is going to compare the two regulations, namely KHESIndonesia with *Majallah al Ahkâm al 'Adliyyah*Turkey Ustmani.

3. Legal Material

- a. Primary legal material is data obtained directly from the first source.¹¹ According to another opinion, the primary legal material is material that has a legal authority (authoritative).¹² In this case, the primary legal material used by the researcher is KHES and *Majallah al Ahkâm al 'Adliyyah* as the original source of this research object.
- b. Secondary legal material is all about the law publication which is not an official document. The publication consists of: (a) textbooks that discuss a problem of law, thesis, and law dissertation; (b) legal journals; and (c) the comments of the judge's adjudication.¹³ In this case, the researcher uses the books or the classic books, theses and law journal.
- c. Tertiary legal materials, it is a material that provides instruction or explanation against the primary and secondary legal materials.¹⁴ Tertiary legal materials used in this legal research is a law dictionary.

4. Data Collecting Method

Collecting legal material method used by researcher in this normative legal research is using documentation method. Documentation method is a data

¹⁰Bambang Sanggono, *Metodologi Penelitian Hukum*, (Jakarta: PT. Raja Grafindo Persama, 1997), p. 114.

¹¹Zainuddin Ali, *Metode Penelitian Hukum*, (Jakarta: Sinar Grafika, 2011), p. 47.

¹²Zainuddin Ali, *Metode Penelitian Hukum*, p. 54.

¹³Zainuddin Ali, *Metode Penelitian Hukum*, p. 54.

¹⁴Soerjono Soekanto and Sri Mahmudi, *Penelitian Hukum Normatif*, p. 13

collecting method by searching for data on matters or variable in note forms, transcripts, books, newspapers, magazines, meetings, agendas and so on.¹⁵ In the collecting of data, the researcher uses this method because it is easier than other methods because when there are mistakes such as errors in the research, it can be examined again because the source data does not change. Documenting the both *rahn* concepts in Islamic law codification above.

5. Processing and Analyzing of Data

After collecting data and legal materials, the next step is data processing. Data processing is processing of data in such ways so that the data and the law arranged in systematic, so it will make it easier for the researchers in conducting the analysis. In normative legal research, processing of materials formed in activities to organize a systematization of materials against written law.¹⁶

From legal materials have been collected by the author, furthermore the author's conduct legal materials or data processing, either primary or secondary in way of selecting data, classifying as well as arranging those data systematically. In this case, the author relates and compares between a material law to other legal materials, so obtained a general overview of the research results. Data analysis is an activity toward research in the form of study or examination results of data processing that assisted with theories that have been obtained at first. In simple terms this data analysis is referred as an activity to provide an examination, which could mean opposing, criticising, supporting, augmenting, or making comments and then making a conclusion against the results of the research with own

¹⁵Soerjono Soekanto and Sri Mahmudi, *Penelitian Hukum Normatif*, p. 13

¹⁶Mukti Fajar ND and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris* (Yogyakarta, 2010), p. 160.

thoughts and theories that has been mastered.¹⁷The preparation of the study, the author uses descriptive data analysis, because the author wants to give an overview or exposure over the subject and object of the research.

H. Previous Research

In order to find out and make a clear that these research has a very substantial differences with previous research results that relate to the research above, it needs to be explained in earlier research results to be examined in depth. From the results of the penuluruhan researchers do not exist and none of the previous researchs that examine on the comparison of *rahn* concept between the KHES with *Majallah al Ahkâm al 'Adliyyah*. Therefore from this thing the researcher will put forward some earlier research relating to the *rahn* concept of comparison is generally as follows:

1. A journal written by Aprilianti (2007) entitled "*Studi Komperatif Sistem Gadai Konvensional Dengan Gadai Syariah di Indonesia*". In that research that conducted by Apriliantientitled above using qualitative research using comparative analysis. On the research, there is some differences with the research that will be conducted by researcher, especially on the object of research. The object of research conducted by Aprilianti the research object is comparison on pawn system in conventional pawn and sharia pawn in Indonesia. While the research is going to be conducted by the researcher is the comparison *rahn* concept in Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah*.

¹⁷Fajar dan Achmad, *Dualime Penelitian*, p. 183.

2. Thesis written by Zeni Rosyidah (2015), students of IAIN Tulungagung, Sharia and legal science Faculty, Sharia Economy Law Department entitled ***“Studi Komparatif Sistem Antara Gadai Konvensional dan Gadai Syariah (Rahn) Dalam Perspektif Hukum Islam”***. From the research above that the kind of research is qualitative, because the research used descriptive data such as written or oral facts from a person or an observed subject. The thing that distinguishes that research with the research that will be conducted by the researcher is in the object of study and different viewpoints. The thesis object of study by Zeni Rosyidah above is system of conventional pawn and Islamic pawn that examined with Islamic law perspective, while the research is going to be conducted by the researcher has object that is *rahn* concept in the KHES and *Majallah al Ahkâm al ‘Adliyyah*.
3. Thesis written by Annisa Auditasari (2010), student of Syarif Hidayatullah State Islamic University Jakarta, Sharia and law Faculty, Muamalat program of study (Islamic Economy) with title ***“Konsep dan Aplikasi Gadai Syariah (Rahn); (Studi Kasus pada Bank Jabar Banten Syariah Cabang Bandung dan BNI Syariah Cabang Jakarta Selatan)”***. The research conducted by Annisa Auditasari above is conducted with the kind of qualitative research because looking for data and information both of about the concept and application of pawn (*rahn*). The research has value differentiator against the research that is going to be conducted by the researcher, i.e. the researcher will examine with the kind of normative research while the thesis written by Annisa Auditasari is empirical research. On the other hand, the research that

will be conducted by the researcher using a comparative approach while the research was conducted by Annisa Auditasari using descriptive approach.

4. A research that conducted by Abbas Arfan, Lecturer of Sharia Business Law, Sharia Faculty, Maulana Malik Ibrahim Malang State Islamic University entitled: "*Optimalisasi Serapan Kaidah-Kaidah Fiqh Mu'âmalah Dalam Kompilasi Hukum Ekonomi Syariah*". The research is qualitative research of library research using *ushul fiqh* approach and comparative approach against (application) principles of *fiqhm u'âmalah* in Compilation of Sharia Economic Law (KHES). The research has some similarities with the research which is going to be conducted by the researcher in using kind of qualitative research and has comparison with *Majallah al Ahkâm al 'Adliyyah*. But, the research has some substantial differences with the research which is going to be conducted by the researcher, they are the approach that used by Abbas Arfan is *ushul fiqh* approach and comparative while the researcher using comparative and statue approach in this research. Then, the research object in the research belongs to Abbas Arfan is optimalization of *fiqhm u'âmalah* principles while the object of researcher in this research is comparison of *rahn* transaction, although the comparison conducted by Abbas Arfan and the researcher is same, comparing between KHES and *Majallah al Ahkâm al 'Adliyyah* but has different view. In explaining the differences, the researcher tries to tell the difference in research that is going to be conducted by researcher with the earlier studies, as follows:

Table 1: The Similarities and Differences of Previous Research

No	Name/ Faculty/ University/ Year	Title	Similarities	Differences
1	2	3	4	5
1	Aprilianti/ Faculty of Law, Lampung University/ 2007	Comparative Studies of Conventional Pawn System with Shaia Pawn in Indonesia	<ul style="list-style-type: none"> - Using comparative approach - Related to <i>rahn</i> 	<ul style="list-style-type: none"> - Not comparing statutes - Comparing sytem no concept
2	Zeni Rosyidah/ Faculty of Sharia and Law/ Tulungagung University/ 2015	Comparative Studies of System between Conventional pawn and Sharia Pawn in Islamic Law Perspective.	<ul style="list-style-type: none"> - Using comparative approach - Related to <i>rahn</i> 	<ul style="list-style-type: none"> - Not comparing statutes - Comparing sytem no concept - Overiewing both of system in Islamic Law perspective.
3	Annisa Auditasari/ Faculty of Sharia and Law/ State Islamic University of Syarif Hidayatullah/ 2010	Consept and Aplication of Sharia Pawn (<i>Rahn</i>); (Studies in Jabar Banten Bank Branch of Bandung and BNI Sharia Bank of South Jakarta)	<ul style="list-style-type: none"> - Related to <i>rahn</i> - Using comparative approach 	<ul style="list-style-type: none"> - Empiric research - Comparing <i>rahn</i> in two banks
4	Abbas Arfan, Sharia Faculty/ Maulana Malik Ibrahim State Islamic University Malang	Optimalization of <i>Fiqh Mu'âmalah</i> principles in KHES	<ul style="list-style-type: none"> - Using comparison - Comparing between KHES and <i>Majallah al Ahkâm al 'Adliyyah</i> 	<ul style="list-style-type: none"> - The object is <i>fiqhmu'âmalah</i> principles - Using <i>ushul fiqh</i> approach
5	Muh Mansyur/ Faculty of Sharia, Islamic State University of Maulana Malik Ibrahim Malang/ 2017	Comparison of <i>Rahn</i> Concept Between Compilation of Sharia Economic Law and <i>Majallah al Ahkâm al</i>	<ul style="list-style-type: none"> - Using Comparative approach - Related to <i>rahn</i> 	<ul style="list-style-type: none"> - Statute approach - Comparing <i>rahn</i> concept

		<i>'Adliyyah</i>		
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I. Structure of Discussion

To obtain the understandable and comprehensive description about the content in this thesis globally, they can be seen from the systematic discussion of the thesis below:

Chapter I: In this chapter is introduction that is going to describe several things, there are formulation of the problems, research objectives, benefits of research, operational definition, as well as a systematic discussion.

Chapter II: the chapter is about review of the literature. In this chapter, there are two parts that is, previous research studies explain the difference with previous research that examined by researcher and general review of *rahn* including: understanding, basic legal of *rahn* and *rukun* and requirements of *rahn*, etc.

Chapter III: the chapter is talking about research results and discussion. This chapter is a core chapter in this study it is discussing the comparative analysis about the *rahn* concept of Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah* either from similarity or difference side of both Islamic law Compilation.

Chapter IV : this chapter is closing or final chapter. This chapter is going to present the conclusions of the research results conducted by listing the similarities and differences between Compilation of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah*. Then proceed with the suggestions as input both for practitioners in the field of law and readers. Then proceed with the attachment and researcher's vita.



CHAPTER II

REVIEW OF RELATED CONCEPT

A. Definition of *Rahn*

Pawn in Arabic language, according to *rahn* meaning comes from the word: *rahana-rahnan* its synonym is:

- a. *Tsabata*, meaning fixed;
- b. *Dâma*, which means everlasting or eternal;
- c. *Habasa*, means hold.¹⁸

In terminology, according to Sayyid Sabiq, *rahnis* making goods that have a value property according to the view of *sharia* as collateral debt, until the person concerned should take on debt or he could take some of that stuff

¹⁸Ahmad Wardi Mushlich, *Fiqh Muamalah*, (Jakarta: Amzah, 2010), p. 286.

(benefits).¹⁹ While according to Ibn Qudhaman in *al Mughni* is something made as belief of debt to be filled from the price, if the debtor is not able to pay it from the creditor.²⁰ Abu Zakaria al Anshary in his book *Fath al Wahab* defines *rahn* is making objects are material possessions as belief of something can be paid from the property when the debt is not paid.²¹ Beside it, there several *fuqahâ* opinions, they are:

According to the *Syafi'iyah* scholars defines *rahn* as follows

جعل عين يجوز بيعها وثيقة بدين منها عند تعذروا وده

“Making a good in ordinary to sell as debt collateral filled from the price, if the debtor is not able to pay his debt”.²²

Hanbali scholars reveal the following:

المال الذي يجعل وثيقة بدين يستفي من ثمنه أن تعذر استفاؤه ممن هو عليه

“An object that made a trust debt, to be filled from the price, if the debtor is not able to pay”.²³

Maliki scholars define as follows:

شيء متمول يؤخذ من مالكه توثقا به في دين لازم

“Something that is worth as treasure (*mumawwwal*) taken from its ownersin made as a binding on the debt that remains.”²⁴

Syafi'i Antonio, an expert on the contemporary Islamic economy defines that the Islamic Pawn (*rahn*) is holding one of the customer's possessions (*rahîn*) as goods guarantee (*marhûn*) on the debt/loans (*marhûn bih*) received. The

¹⁹ Abdul Ghofur Anshori, *Gadai Syariah di Indonesia: Konsep, implementasi dan insitusionalisasi*, (Yogyakarta: Gajahmata University Press, 2006), p. 88.

²⁰ Anshori, *Gadai Syariah di Indonesia*, p. 88.

²¹ Anshori, *Gadai Syariah di Indonesia*, p. 88.

²² Zainuddin Ali, *Hukum Gadai Syariah*, (Jakarta: Sinar Grafika, 2008), p. 2

²³ Zainuddin Ali, *Hukum Gadai Syariah*, p. 2.

²⁴ Zainuddin Ali, *Hukum Gadai Syariah*, p. 2-3.

Marhûn has economy value. Thus, the party who hold the pawn or recipient (*murtahin*) acquires the guarantee to be able to take back all or part of his credit.²⁵

B. Legal Basis of *Rahn*

As an Islamic contract, *rahn* has some bases, they are:

1. Al Qur'an

Verse of the Qur'an that basisable in *rahn* transaction is *surat* al-Baqarah verse 283, namely:

وَأِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانَ مَقْبُوضَةٍ فَإِنْ مِنْ بَعْضِكُمْ
بَعْضًا فليؤدِّ الَّذِي أُؤْتِمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ
يَكْتُمْهَا فَإِنَّهُ آتَمُّ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

"If ye be on a journey and cannot find a scribe, then a pledge in hand (shall suffice). And if one of you entrusteth to another let him who is trusted deliver up that which is entrusted to him (according to the pact between them) and let him observe his duty to Allah his Lord. Hide not testimony. He who hideth it, verily his heart is sinful. Allah is Aware of what ye do".

Shaykh Muhammad Ali al Sayis argues, that the verse of the Qur'an above is an instructions for applying the principle of prudence when someone want to conduct debt transactions using time period with other people, by assuring a goods to the creditor. Pawn item function on the verse is to keep the trust of each party, so recipients believes that pledge that pawn giver has a good intend in gaving back his goods or thing, as well as not neglecting the loan repayment period.

Although the verse literally indicates that *rahn* is conducted by a person while in a journey. This is, doesn't means is prohibited if conducted by the

²⁵Zainuddin Ali, *Hukum Gadai Syariah*, p. 3.

people in resident. Because resident is not a requirement of *rahn* transaction validity. Moreover, there is a hadith that tells that the Prophet. Mortgaged his iron shirt to a Jew, to get food for his family, it was a time he did not make the trip.²⁶

2. Hadith of Prophet Muhammad Saw

In addition to the verse of the Qur'an that became a basis in the pawn transactions, there is also the hadith that explain about it, they are,:

حدثنا نصر ابن علي الجهضمي حدثني أبي، حدثنا هشام بن قتادة عن أنس، قال: لقد رهن رسول الله صلى الله عليه وسلم درعا عند يهودي بالدينة فأخذ لأهله منه سعيرا (رواه بن ماجة)

“It has been narrated to us Nasr son of Ali al Jahdhami, my father had narrated to me, narrated it to us the Hisham bin Qutaadah from Anas said: the Prophet Muhammad Saw mortgaged his own iron shirt to a Jew in Medina and changed it with grain for his family”. (Narrated By Ibn Maajah).²⁷

In addition there is also another Hadith, narrated from Abu Huraira by Imam Bukhari which reads:

حدثنا محمد بن مقاتل أخبرنا عبد الله بن مبارك زكريا عن الشعبي أبي هريرة رضي الله عنه قال، قال رسول الله صلى الله عليه وسلم الظهر يركب بنفقة إذا ما مرهونا ولبن الدار ويشرب النفقة إذا كان مرهونا وعلى الذي يركب ويشرب النفقة (رواه البخاري)

“It has been narrated to us Muhammad son of Muqatil, told to us Abdullah bin Mubarak, told to us Zakariya from Sya’bi from Abu Hurayrah, from the Prophet Muhammad Saw. He said that the vehicle can be used and livestock can also be taken benefits if mortgaged. The debtor requires to provide a living and the recipient may get benefit a pawn”. (Narrated By Al-Bukhari).²⁸

²⁶Zainuddin Ali, *Hukum Gadai Syariah*, p. 5-6.

²⁷Zainuddin Ali, *Hukum Gadai Syariah*, p. 7.

²⁸Zainuddin Ali, *Hukum Gadai Syariah*, p. 7.

In addition to the Hadith above, Abu Hurairah also narrated another Hadith as follows:

عن أبي هريرة رضي الله عنه: قال رسول الله صلى الله عليه وسلم: يغلق الرهن لصاحبه له غنمه معليه غزمه (رواه الشافعي والدار القطني)

“Pawn Goods should not be hidden from the owner who mortgaged, for him the risk and results”. (Narrated by as Syafi’i and Ad-Daruquthni).²⁹

There is another hadis narrated by Aisyah as follows:

فروت عائشة رضي الله عنها: أم رسول الله صلى الله عليه وسلم اشترى من يهودي طعاما ورهن درعه ()

“Mrs. Aisyah Ra narrated that Rasulullah Saw bought some food from a jew and he pawned his iron cloth” (Narrated by Bukhori and Muslim).³⁰

In the case of *rahn*, Anas bin Malik narrated a hadis too, that is:

رهن رسول الله صلى الله عليه وسلم درعا له عند يهودي بالمدينة فأخذ منه شعيرا

“Rasulullah Saw pawned his own iron cloth to a jew in Medina then and got some wheat for his family”.

3. Agreement of Islamic Scholars (*Ijma*)

The majority of scholars agreed the capacity of the legal status of pawn. It means, based on the story of the Prophet Muhammad Saw. that mortgaged his iron shirt to get food from a Jew. The scholars also took an indication from the example of the Prophet Muhammad. When he changed from the common transaction to reach companions to a Jew, that is all only an attitude

²⁹Zainuddin Ali, *Hukum Gadai Syariah*, p. 8

³⁰Hasa Ayub, *al Mu’amalah al Maliyyah Fi al Islam*, (Mesir: Darus Salam, 2006), p. 199.

of prophet Muhammad Saw. that would not burden the companions that usually refuse to take replacement or price given by Prophet Muhammad Saw. to them.³¹

4. *Fatwa* of DSN-MUI

Fatwa of Nasional *Sharia* Board, Indonesia Scholar Assembly (DSN-MUI) became one of the reference concerning the *sharia* pawn, that revealed as follows:³²

- a. *Fatwa* of Nasional *Sharia* Board, Indonesia Scholar Assembly No. 25/DSN-MUI/III/2002 About *Rahn*;
- b. *Fatwa* of Nasional *Sharia* Board, Indonesia Scholar Assembly No. 26/DSN-MUI/III/2002 About *Rahn* of Gold;
- c. *Fatwa* of Nasional *Sharia* Board, Indonesia Scholar Assembly No. 09/DSN-MUI/IV/2000 About Financing of *Ijârah*;
- d. *Fatwa* of Nasional *Sharia* Board, Indonesia Scholar Assembly No. 10/DSN-MUI/III/2000 About *Wakalah*;
- e. *Fatwa* of Nasional *Sharia* Board, Indonesia Scholar Assembly No. 43/DSN-MUI/VIII/2004 About compensation.

C. Pillars and Requirements of *Rahn*

According to the majority scholars, there are four pillars of *rahn*:

1. *Marhûn* (goods in pawn)
2. *Marhûn bih* (debt/loan)
3. *Aqidain râhin wal Murtahin* (debtor and creditor)
4. form of *Ijâb* and *Qabûl* (speech-handover)

³¹Zainuddin Ali, *Hukum Gadai Syariah*, p. 8.

³²Zainuddin Ali, *Hukum Gadai Syariah*, p. 8.

According to Imam Abu Hanifah, in accordance with his view about the pillars of *rahn* are only *ijâband qabûl*.³³ Whereas the terms related to the pillars above, they are:

1. Terms Related to Subject of Transaction (‘Âqidain).

The requirement for parties who conduct a transaction are those that meet the criteria of *ahliyat uat tabarru'*, they are intelligence, puberty (*bâligh*), able to manage his wealth (*al rusyd*) and in conditions of no coercion and pressure. Then, for young children and crazy people who are not able to manage his wealth are not valid to conduct *rahn* transaction. However, according to Imam Abu Hanifah, the both sides are not required reaching puberty (*bâligh*), but enough with intelligence. Therefore, young children who is *mumayyizis* allowed to conduct *rahn* contract, on the condition get the permission of his guardian.³⁴

2. The Terms Related to *Marhûn* (Goods in Pawn)

- a. The goods in pawn are goods that can be traded (having economy value) in view of sharia;
- b. The value is balanced with debt;
- c. Clear and specific;
- d. Belongs to debtor legally;
- e. There is no relation with the rights of others;
- f. The goods is intact and not spreaded in several places; and
- g. Able in submitting either the material or its benefits.³⁵

³³Yazid Afandi, *Fiqh Muamalah dan Implementasinya Dalam Lembaga Keuangan Syariah*, (Yogyakarta: Longung Pustaka, 2009), p. 151-152.

³⁴Yazid Afandi, *Fiqh Muamalah*, p. 152-153.

³⁵Yazid Afandi, *Fiqh Muamalah*, p. 152.

Beside the opinion above Hanafiyah scholars defines some pillars and requirement according to *rahn*, they are:

a. *Marhûn* is salable

That is, *marhûn* must exist when the contract and could be handed over. Based on this, it is not legitimate to pawn something that did not exist when the contract, to pawn something that may exist and there may be no (speculative) is invalid. Such a person mortgages fruits that will be produced by the tree this year, or a goat that will be born by the mother this year, or mortgaging a flying bird, animal escapes and others in the form of things that cannot be used to pay existing debts (*marhûn bih*) and does not allow for sale. This requirement is agreed by the majority of *fuqahâ*. This term is the opinions of Hanafiyyah scholars, Syafi'iyah scholars referring to *toadzhar* opinion, Zahir on existing narrations according to Malikiyyah scholars as researched and defined by ad-Dasuqi, and it is one of the versions of the Hanabillah scholars opinions. Based on this, they tell that pawning fruits before appearing the good result is illegitimate, before getting old. Also invalid mortgaging farmer plant which is still green with no terms *al-qath'u* (cutting it). Because the fruit that does not appear in good is invalid for sale, therefore it should not pawn such things like that that should not be sold.

Ibn Qasim and Ibn Majisyun, both of whom were Malikiyyah scholar and Hanabillah scholar. according to more *shahîh* opinion on their side, says that there are some things that are excepted by rule "something that is not

valid, then the sale is invalid digadaikan". Therefore religion ordered *wadh'ul jawâ'ih*. While the reasons are not found in the pledge, because the existing debt actually is in the burdenal *madîn* party, i.e. ar *râhin*. The elements of *gharar* (fraud) or *khatar* (risk) the percentage is very small in it. Because if the goods are damaged, then it the right of *murtahin* does not disappear, but still remains becoming burden of *râhin* party. And if the good in mortgage is not damaged like the crops are still ripe bears fruits that has not been good apparent finally be picked or lost animal has returned, then the benefit on *murtahin* party can be obtained, then things will be sold when the debt is due or the sale could be postponed if *murtahin* party desires it. Based on this, according to Hanabillah scholars and Malikiyyah scholars, receiving pawn of something while on the processing of *rahn* transaction, that something it has yet to be sold, and the *marhûn* cannot be sold unless it has good looks, even though the debt is on due.³⁶

b. *Marhûn* should be a wealth

Because of this term, pawning something that is not a wealth is not valid, such as corpse, result of hunting in *harâm* land atau someone's result of hunting who is in *ihram*.³⁷

c. Pawning utility/ benefit

According to *fuqahâ*, it is invalid mortgageing the benefit.. While according to scholars Hanafiyyah, because the benefit could not be

³⁶Wahbah az Zuhaili, *Fiqh Islam wa Adillatuhu*, terj. Abdul Hayyie al Kattani, Cet. 1, (Jakarta: Gema Insani, 2011), p. 133-134.

³⁷az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 133-134

handed over at the time of contract, the benefit does not exist, then if has been existing, it will instantly disappear and be replaced with another benefit. So the benefit is having a distinctive and settle characteristic, so can not be given. But the illegitimate to pawn the benefit according to the *Syafi'iyah* scholars is if the benefit becomes something in pawn since the beginning. Therefore, according to the *Syafi'iyah* scholars, pawning the benefit without rising *rahn* contract, like somebody died but he still has rights in the form of a benefit while at the same time, he also has a burden debts.³⁸

d. *Marhûn* should be *mutaqawwam*

It means that it is able in use according to religion, in suppsing the debt could be paid from that *marhûn*.³⁹

e. *Marhûn* should be distinctive and certainly

It just like the way of commodity could be saled, it is provised should be distinctive and certainly.⁴⁰

f. Pawning something undistinctive and uncertainly

Based on this condition, then every something even though it contains elements of *jahâlah* (vague, unknown clearly and definitely), but still valid for sale, then legitimate in pawn. Whereas something that contains element of *jahâlah* but is not valid for sale, then it is also not valid for pawn. The form required to figure out which goods for sale is to figure

³⁸az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 135.

³⁹az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 135.

⁴⁰az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 136.

out which can prevent appearing the dispute or to know something usually can prevent the appearing of dispute.⁴¹

g. The *marhûn* belongs to *râhin*

According to Hanafiyyah scholars, this requirement is not one of the condition of *rahn* contract, but it is condition for applying *rahn* contract in effective. Based on this thing, then it can be known the law of mortgaging other's property. Therefore, a person lawfully mortgages property of others without permission on the basis of a legitimate authority, like a father or *wâshi* (a person who is appointed to take care and manage the property of orphans). Based on this, the father or *wâshi* legitimate mortgaging child's property on his guard, either *marhûn bih* is on the responsibility of the child him self or the debt responsibility of the guardian or *wâshi* him self. It runs just like that, mortgaging someone else's treasure of lawfully on permission of the property owner, such as a person borrows a thing from others in order to be mortgage by him self with *marhûn bih* is a responsibility of the borrower.

Syafi'iyah and Hanabillah scholars argue that mortgaging property of others without his permission is invalid. Because selling other people's property without owner's permission is not valid. In addition, the treasure could not be submitted and cannot be sold to pay the *râhin*'s debt responsibility party *tomurtahin*, then because of invalid pawn. Therefore, if there is someone pawns a goods that he thinks belongs to someone

⁴¹az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 136.

else, then it turns out that the goods belongs to his father, while his father has died and that goods become his belonging through inheritance way, then according to the scholars of Hanabillah and according to one version of the Syafi'iyah scholars opinion, *rahn* like this is legitimate. Because inside *mu'amalah* (transactions) that count is its essence. While according to determined view of Syafi'iyah *madzhâb*, *rahn* transaction is conducted in conditions of *râhin* party in tinkerly, therefore the contract is invalid. If there is someone borrows something for being pawned, then it is legitimate based on leaders agreement from existing *madzhâbs*. Because with the loan, meaning he holds belonging of another in sung it by him self without any substitution or repayment it *isi'aarah* (borrowing) condition indeed, thus lending such as like that is valid to get a benefit from borrowed item benefit⁴².

- h. The *marhûn* should be *mufarraqah* (does not patch to something not morgaged)

It means not in condition still relates to something that belongs to *râhin*. Therefore, it is not valid pawning palm tree only without involving the fruit. it is also invalid pawning an area of land only without involving the plants.⁴³

- i. The *marhûn* should be *muhawwaz*

⁴²az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 137.

⁴³az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 137-138.

Therefore, pawning fruit on a tree without requiring the tree is, it is invalid mortgage too pawning plants of agricultural without requiring that land. Because it could be possible put the mastery against the existing fruit on the tree or farming plants which is still planted on the land without the area or the land.⁴⁴

j. The *marhûn* should be *mutamayyiz*

Based on this condition, then it is not valid in the mortgaging a half of home or a quarter of vehicles, although it is mortgaged to *syarîk* (the party who co-owns the item). The reason why *marhûn* required must be *mufarraqah*, *muhawwaz* and *mutamayyiz* is because *al qabdlu* (the holder against the *marhûn*) are applicable terms to bind a *rahn* contract, not legitimate term. While *al qabdlu* can not run as long as the things become a barrier above. Based on this description, it can be known that this third on the fact is *al qabdlu*'s elements or handing over to the *marhûn* can be done with fulfilling these elements⁴⁵.

Basically, the *marhûn*'s benefits should not be taken, either by *râhin* or *murtahin*, unless with permission of each party concerned. Rights *murtahin* against *marhûn* only as holding *marhûn* hand in *murtahin* as guarantee of *marhûn bih*, *râhin* has no right in using *marhûn*, unless both of *râhin* and *murtahin* have an agreement. While, about the ability of *marhûn* could be taken on benefit, some scholars have different opinion.⁴⁶

⁴⁴az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 137-138.

⁴⁵az Zuhaili, *Fiqh Islam wa Adillatuhu*, h. 138.

⁴⁶Adrian Sutedi, *Hukum Gadai Syariah*, (Bandung: Alfabeta, 2011), h. 40.

3. The Terms Related to *Marhûn Bih* (Debt/ Loan)

- a. The debt should be a rights that must be returned to the creditor;
- b. The debt could be settled by that *marhûn*; and
- c. The debt is distinctive and certainly.
- d. The *marhûn* is possible in use. If something become a debt can not be used it is not valid.
- e. Should be qualificated or the amount can be counted. If can not be measured it is not valid.⁴⁷

The terms of *marhûn bih* referes to Hanafiyyah scholars as follows:

- a. A right must be given back to creditor

Because if *mahûn bih* is not a right that must be turned over to its owner, then there is no reason to give something for pawn as collateral. Hanafiyyah scholars defines the terms as follows, *marhûn bih* must be a debt form, meaning that debt is a debt that must be paid and delivered by *râhin*. However the phrase we use to describe this first condition clearer. Because a right which becomes *marhûn bih* sometime *indâin* form (debt) and sometimes in *al 'ain* form (goods or wealth that it is already concrete, as opposed to *dâin* or debt) that must be turned over to its owner.⁴⁸

If the *marhûn bih* in the form of debt, then the *rahn* contract is legitimate, however, the debts form, either it ia a borrowing or cause of selling and buying selling (not in cash), or debt in the form of fine because of

⁴⁷Sutedi, *Hukum Gadai Syariah*, h. 39.

⁴⁸az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 123.

damaging an object or because *ghashab* action. Because the debt or dain is something must be paid. Therefore, doing *rahn* contract while debt or *marhûn bihis* responsibility debts is *rahn* on the basis of the existence of a right that must be turned over to its owner.

- b. Either in this case whether the debt is including debt that is interchangeable (*al istibdâl*) before hand over (*al qabdlu*), as well as including before acceptance, such as the price of *salam* contract (order, meaning the price of the ordered goods), the price of the contract switcher of *sharf* (buying and selling gold or silver paid in gold or silver, and the ordered goods). This is according to the third Hanafiyyah scholars (Imam Abu Hanifah, Muhammad and Abu Yusuf).

Evidence and argument of the opinions of Hanafiyyah scholars is that the paid off of existing debt when pawned item is destroyed as no longer form of *al istîfâ* (accepting payments on debt) rather than as a form of *al istibdâl* (as a substitution, meaning that the debt paid off is as an exchange of defective goods that mortgaged). Because *al istîfâ* had enough with the *al mujannasah* (the similarity of kind) in terms of *mâliyyah* (wealthy) between the mortgaged goods and debt become *marhûn bih*. Because of the nature of *istîfâ* here is with the wealthy of mortgaged goods not by the form of the goods. All goods in the view of wealthy is one kind.

Imam Malik and Imam Syafi'i said that should not hold a *rahn* contract with *marhûn bihin* form of price changer of *as sharf* contract and the ordered goods bound with the responsibility. Because the price of the

ordered goods should be handed over directly at the place of contract, as well as *sharf* contract required to do by the way at *taqâbudl* (cash and carry) in the contract place. And it is legitimate doing *rahn* contract with *marhûn bihon* the form of *muslam fih* (something that is ordered). Because *muslam fih* is including to *dâin* (responsibility debts), and the verses of the Qur'an allows *rahn* contract in the form of *al mudayyanah* (transaction not in cash).⁴⁹

- d. If *marhûn bihis* in 'ain form (items, treasures that already concrete), then the explanation is as follows.

If the *al 'ain* in the form of trusteeship goods, like goods mandate deposit, loan, lease, property of *assyarîkah* contract and *al mudlârabah*, then it should not be made *marhûn bih* based on consensus of scholars. Because *al qabdlu* could lead to attainment of *alistîfâ*. When *al 'ain* or hat stuff in the form of something that is covered with the *al 'ain* itself, means that if the stuff is broken or lost, then it is obliged to replace it with something similar if indeed the goods has a similarity (*mitsli* wealth, or replace the property with the value if it does not have a similarity (*qîmi* property), then according to the Hanafiyyah scholars, *al 'ain* something like this could be made *marhûn bih*, and the *murtahin* holds mortgaged stuff until he receives back the *al 'ain* which becomes *marhûn bih*. Meanwhile, Malikiyyah and Hanabillah scholars have the

⁴⁹az Zuhaili, *Fiqh Islam wa Adillatuhu*, h. 123-125.

same opinion with the opinion of the Hanafiyyah scholars above, i.e. *al 'ain* are covered with *al 'ain* itself could be made as *marhûn bih*.

While the Syafi'iyah scholars argue that should not hold a *rahn* contract with *marhûn bihin* the form *al 'ain* in mandate or guarantee *al 'ain*. Because they require *marhûn bih* must be *dâin* (responsibility debts). Because Allah Swt mentions *rahn* in the *al mudayyanah* (the things are in debt or in other words the transaction is not in cash).⁵⁰

e. The debt could be paid with the guarantee

When *marhûn bih* is impossible to be paid from *marhûn*, then the *rahn* contract is invalid. Because the *irtihân* goal is for *istifâ*. Therefore, if the element of *istifâ* does not exist means *rahn* and the goal do not exist. Based on this condition, then a *rahn* contract is not legitimate with *marhûn bih* in the form of things such the following:

- 1) *Marhûn bih* in the form *qishsâsh* or *hadd* punishment, because it is impossible for *qishsâsh* or *hadd* is met from the mortgaged stuff, but be *marhûn bihin* fine of *jinâyah* is legitimate.⁵¹
- 2) *Marhûn bih* in the form *kafâlah* (assurance) with *makfûl bih* in the form of soul or a person, i.e. a guarantee of presenting someone to the courts etc.⁵²
- 3) *Marhûn bihin* form of *syuf'ah* rights, meaning the form is not valid taking pawn stuff from the buyer party, the party is obliged to hand over the goods he bought cause of the *syuf'ah* right.⁵³

⁵⁰az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 125-128.

⁵¹az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 129.

⁵²az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 129-130.

4) *Marhûn bih* in the form of wages or the unlawful work, such as wages of women who served in cerying and bewailing for the dead, wages woman singer, ordancer's wages.⁵⁴

f. Destinctive and Certainly Debt

Therefore, it is not a legitimate *rahn*contract with *marhûn bih* in the form of a right that is not known clearly and definitely.

Meanwhile, the Syafi'iyah and Hanabillah scholars require three things against *marhûn bih* as follows:

1) *Marhûn bih* must be positive and obligatory *dâin*(responsibility debts), such as loan debt, the value of goods that was damaged.

According to Syafi'iyyah scholars, holding a *rahn*contract with *marhûn bih* in the form of *al 'ain* (goods) that is loaned or in *ghashâb* is invalid, while Hanabillah scholars allow *rahn* contract with *marhûn bih* in the form of insured property.

According to Syafi'iyah and Hanabillah scholars, holdng *rahn* contract with *marhûn bih* in the form of debt that has not been fixed and positive, that the promised debt will be given. This is in contrast to the opinion of Hanafiyyah scholars.⁵⁵

⁵³az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 130

⁵⁴az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 129-130.

⁵⁵az Zuhaili, *Fiqih Islam wa Adillatuhu*, p. 130-132.

- 2) Debt which was made *marhûn bih* should already obligatory (positive and binding) or will culminate into obligatory.⁵⁶
- 3) Debt which is made to *bemarhûn bih* should be known clearly its specification, namely, amount and its characteristic, by both sides. If the debt becomes *marhûn bih* is not known clearly by both parties or by one of them, or there two responsibility debts and the the debts are unspecified which is made to *bemarhûn bih*, then the *rahn* contract is invalid.⁵⁷

4. Terms Related to Form of *Ijâb* And *Qabûl*.

Required handover statement, should be continuity between the statement and submission (*ijâb*) and the acceptance statement (*qabûl*). The words spoken by the parties has to have not rest from other transactions. In addition, *qabûl* pronunciation should match with the *ijâb*. Meanwhile, the *madzhâbs* scholars have different opinions about the statement that associating the goods with the particular provision. The Hanafiyah scholars mention with the pronunciation *rahn* contract should not be associated with specific terms or associated with the future. If *rahn* contract is associated with certain condition or future then the requirement is canceled while transaction is valid. For example, the debtor requires “in due time of debt had been discharged and the debt has not been paid off, then the *rahn* extended by one month”. The statement such this by itself has no effect at all with the *rahn* contract. It means, this requirement needs not be promised and *rahn* can still be considered valid.

⁵⁶az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 132.

⁵⁷az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 132-133.

Unlike the Hanafiyah *madzhâb* above, Syafi'iyah mazhab argues, if there are any additional requirements specified in *shighât* process, then they are classified into three terms, they are *shahîh* requirement, invalid requirement, and term that could damage the validity of the contract. The *shahîh* requirement is requirement supports the existence of the contract and strengthen each the rights and obligations. These terms can be accepted and must be obeyed by the parties. Invalid requirement is term that has no *mashlahah* for the existence of goods in pawn. The terms such this is not accepted and the contract still considered valid. While the term of the contract that could damage is a requirement setted by *râhin* resulting in *madlârat* for *murtahin*. This requirement makes the *rahn* contract cannot implementable.⁵⁸

D. Cost Maintenance of *Marhûn*

Fuqahâ agreed that the cost needed by *marhûn* become the responsibility of *râhin* or in another word *râhin* has an obligation to finance the things needed by the *marhûn*, because religion has determined that benefit and profit of *marhûn* gotten belong to *râhin*, as well as religion also determined that the costs required by *marhûn* become his responsibilities.

لا يغلط الرهن من صاحبه الذي رهنه، له غنمه وعليه غرمه

“the stuff in pawn is not separated of its ownership to the party who has pawned it, for party who pawn a benefit of pawn stuff and becomes his charge, the fees required by the pawn stuff”.

However, the *fuqahâ* have different opinion about *marhûn* cost which become an obligation and responsibility of the *râhin*. In this case there are two opinions:

⁵⁸Yazid Afandi, *Fiqh Muamalah*, p. 153-154.

1. Hanafiyah scholar say, that cost is required by *marhûn* is divided between the *râhin* because of his capacity as owner of *marhûn*, and the *murtahin* because of his capacity as a party burdened to take care *marhûn*.

All forms of financing relating to the goodness and the interest of *marhûn* as well as its existence it becomes an *râhin*'s obligation, because *marhûn* is his. While everything needed to keep *marhûn* is *murtahin*'s obligatory. because the *al habshu*/ detention is his right, therefore everything is needed in maintaining *marhûn* also becomes his responsible.

Based on this, then the *râhin*'s incumbent is if the pawn are animal, then the food, drink, and its sheperd wages become *râhin*'s responsibility. While being the obligation and responsibility of the *murtahin* is the cost of care to hire people who are hired to keep it or to pay the cost of the place that used to put and keep the *marhûn*, such as the cost of cages of animal in use, and cost of the warehouse used to put and keep the *marhûn*.⁵⁹

2. In the meantime, the majority of scholars (Malikiyah, Syafi'iyah and Hanabillah scholars) opine that all of the costs required by *marhûn* become the obligation and responsibility of *râhin*, well that is needed to take care of it so that remain intact or are required to keep and treat it.

When *râhin* is not willing to pay these costs, then according to Malikiyah scholar, the *murtahin* funds all of it and ask for a change to the *râhin* although the amount exceeds the value of *marhûn*. All these costs are considered debt outside of a debt which becomes *marhûn bih*. While Syafi'iyah scholars

⁵⁹az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 186-188.

say, the judge forces the *râhin* to cover all *marhûn*'s needs or could be taken from another *râhin*'s treasure or may trade off part of *marhûn*.⁶⁰

E. Utilizing Pawn Stuff (*Marhûn*)

Marhûn is a pawn guarantee of a debt given by *râhin* to *murtahin*. the utilizing of guarantee stuff in *rahn* contract has different opinion either utilized by *râhin* or *murtahin*. The several opinions of *fuqahâ* about *marhûn* utilizing by *râhin* or *murtahin* are as follow:

1. Utilizing Pawn Stuff by *Râhin*

In this case there are two opinions, the first is majority opinion besides the Syafi'iyah scholars say, *râhin* should not be utilize *marhûn*, and the second opinion that is the opinion of the Syafi'iyah scholars say it is permissible for *râhin* utilizing *marhûn* as long as it doesn't harm and inflict damage on *murtahin* side. Further clarification is as follows.

Hanafiyyah scholars say that *râhin* should not utilize *marhûn* in the form of use, riding, wearing, occupy or others except with the permission of *murtahin*, such as *murtahin* also should not utilize *marhûn* except upon to permission of *râhin*. The evidence that *râhin* can not utilize *marhûn* in the form of use, climbing, wearing, occupying or otherwise except with the permission of *murtahin* is that *al habs* is restraining for *murtahin* continuously and this of course means a prohibition on taking back of *marhûn*. If *râhin* takes the *marhûn* in use by himself without permission of *murtahin*, then the *murtahin*'s responsibility against *marhûn* misses and *râhin* are considered to be the man who is doing *ghasab*,

⁶⁰az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 188-189.

therefore, what has he grabbed he has to restore to *murtahin* in force. And if *marhûn* is damaged or lost in his hand then the bearer of losses is *râhin* himself.

But if the utilization against *marhûn* by *râhin* does not make the restraining by *murtahin* against *marhûn* regardless, then it can be. Such as, if *marhûn* is *râhin* then wheat grinder, the *râhin* rent it to *murtahin* to be used to grind grain. And the rent coat is belongs to *râhin*, because something produced by *marhûn* is belongs to *râhin*, and if *murtahin* takes that rest cost, it is put into payment for existing debt. Hanabillah scholars argued such as opinion of Hanafiyyah scholars, i.e. for the *râhin* should not utilize *marhûn* except with *murtahin*'s permission or agreement.⁶¹

In terms of *marhûn* maintenance, *râhin* is not prohibited to repair and take care for *marhûn*, to treat it if it is necessary and gave the pawned female animal if it is needed. Malikiyyah scholars have a harder view than both of the two previous, they determined that *râhin* should not utilize *marhûn*. They also determine that the permission of *murtahin* to *râhin* to take advantage, the existing *rahn* contract is canceled, although *râhin* eventually doesn't really use it. Because the granting of permission by the *murtahin* to the *râhin* in using *marhûn* is considered a form of unbending *murtahin* right against *marhûn*.⁶²

However, because the benefits of *marhûn* belongs to *râhin*, then he could make *murtahin* as his representative in utilizing *marhûn* for himself, in order to benefit of *marhûn* does not vain. Therefore, according to some Malikiyyah scholars, in this case when the *murtahin* wastes the *marhûn* benefit, then he took the

⁶¹az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 189-190.

⁶²az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 191.

standard rental fee for fines to waste and it harms to the *râhin.*, but other scholars say that the *murtahin* do not bear the penalty, because he is not obliged to utilize *marhûn* for the benefit of *râhin.* While other scholars say that in this issue *murtahin* bear the fines except if *râhin* knows that he was allowed to utilize the *marhûn* with the way such above, but he does not deny the vain conducted by *murtahin.* Meanwhile, Syarfi'iyah scholars, have different opinions with scholars's opinions above. They say that *râhin* can utilize *marhûn* in all forms of utilization does not cause decreasing of *marhûn*, such as riding it, use it, occupying it, put it on and use it to transport if the *marhûn* is vehicle animal or vehicle. Because the benefit of *marhûn*, development and anything produced by *marhûn* are belongs to *murtahin* and its status is not bound by the existing debt. It is based on *hadis* narrated by ad Daruquthni and al Hakim,

الرهن مركوب ومحلوب

“the pawn stuff could be ridden and milk can be squeezed”

Also based on the *Hadis* narrated by Imam Bukhari,

الظهر يركب بنفقته إذا كان مرهونا ولبن الدرّ يشرب بنفقته إذا كان مرهونا وعلى
الذي يركب ويشرب النفقة

*“Animal could be carried upon its living cost and maintenance when the animal is pawned, animal milk can be drunk on the basis of its living cost and maintenance when the animal is pawned, the party who rides drinks up the milk of pawned animals is who has the obligation to provide the living and maintenance to the pawned animals”.*⁶³

⁶³az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 191-192.

2. Utilizing Pawn Stuff by *Murtahin*

The majority of scholars beside Hanabillah opine the *murtahin* should not utilize *marhûn*. *Hadis* that explains the permission of utilizing pawned animal in riding and squeezing its milk in accordance with level of feeding of the animal, then they interpret it in the context if the *râhin* are not willing to fulfill the needs of *marhûn*, so who fulfills the needs of *marhûn* is *murtahin*, then if so, *murtahin* may use it in accordance with the levels of the feeding of the pawned animals he has to spend. While the feeding of the pawned animals has being financing. While Hanabillah scholars allow *murtahin* in utilizing *marhûn*, if *marhûn* is animal, then it could be squeezed its milk and riding it in accordance with the level of charge that he spend to feed the animals and finance it.⁶⁴

Detailed explanations regarding the opinions of the two existing view-in this case are as follows:

- a. Hanafiyyah Scholars argue that *murtahin* should not utilize *marhûn*, either in the form of using, climbing, occupying, wearing, or reading unless with the permission of *râhin*. Because the *murtahin* only has a right in restraining (*al habsu*) not utilizing. When *murtahin* utilizes *marhûn*, and then *marhûn* becomes broken when used, then he changed the whole value of the *marhûn*, because it means he had *gashab* it.

If *râhin* permit *murtahin* to take advantage of *marhûn*, according to some Hanafiyyah scholars, *murtahin* can use absolutely there is also forbid it absolutely, because it is *ribâ* or contain something *syubhat* (obscure)

⁶⁴az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 192.

of *ribâ*. But there is also classifying it, if in the contract required that *murtahin* may utilize *marhûn* then it is forbidden (*harâm*) because it is *ribâ*, if it is not required in the contract then it permitted because it means a form of *tabarru'* from *râhin* to *murtahin*. This classification is in accordance with the spirit and values of religious law.⁶⁵ Whereas according to Sayyid Sabiq, that *murtahin* should not utilize *marhûn* though he get permission from *râhin*, except for the *marhûn* in the form of animals so he could ride it or squeeze its milk.⁶⁶

- b. Meanwhil, Malikiyyah scholars classify it, if *râhin* grant permission *murtahin* or *murtahin* requires he can utilize the *marhûn* then it's permitted if existing debt is caused of sale and purchase contract or such as it (exchange contract) and the utilization must be specified in deadline clearly in order not to contain elements of *jahâlah* that might damage *ijârah* contract. In conclusion, that the eight forms of the terms *murtâhin* to utilize *marhûn* for himself, the seven of them are banned, only one allowed. Four forms of them are in relation to a responsibility debt based on loan debt (*al qardl*), while the three in a responsibility in relation to debts cause from transactions of buying and selling. Whereas one form which allowed is if the utilization contract required in the selling and purchase contract and the deadline is determined in utilizing

⁶⁵az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 192-193.

⁶⁶Sayyid Sabiq, *Fiqh Sunnah: Juz 3*, (Kairo: Dar Mesir, 1949), p. 131.

by *murtahin* for free or is it counted as part of the payment of debt on the basis of the existing remain debt paid off immediately.⁶⁷

- c. Syafi'iyah scholars generally such as the opinions of Malikiyyah scholars, i.e. *murtahin* should not utilize pawned goods based on the *Hadis*:

لا يغلِق الرهن من صاحبه الذي رهنه، له غنمه وعليه غرمه

“the stuff in pawn is not separated of its ownership to the party who has pawned it, for party who pawn a benefit of pawn stuff and becomes his charge, the fees required by the pawn stuff”.⁶⁸

- d. As for Hanabillah scholars, they are distinguished, namely if *marhûn* in beside animal, then *murtahin* should not utilize *marhûnat* all without the *râhin*'s permission. *Ifrâhin* allow *murtahin* to take advantage of a pawned goods without reward while his *marhûn bih* is the *qardl* (loan debt), then it should not be, but if there are repayment while the *marhûn bihis qardl* (debt loan), hte it is unpermitted, but if there is repayment of that utilizing it is permitted.⁶⁹

According to Sayyid Sabiq, pawn contract aims to ask the guarantee trust of debt, rather than seeking profit and result. The Act of utilizing different stuff unlike *qirâdl* which flows the benefit, and any form of *qirâdl* that gives benefits is *ribâ*. The situation of *qirâdl* containing elements of the *ribâ*, if its borg is not animal that could be ridden or cattle that could be taken its milk. If the shape of animals or livestock, *murtahin* may utilize as a repayment to feed the animal. Whereas if

⁶⁷az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 194.

⁶⁸az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 195.

⁶⁹az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 195-196.

murtahin does not feed the animal which is *marhûn*, then everything produced by the cattle included in the goods and it becomes *rahn* with its origin, because *rahn* goods benefit belongs to *torâhin*.⁷⁰

The scholars's opinions above could be concluded into several aspects of utilizing *marhûn* by *murtahin*, they are:

Table 2: Opinions of Utilising Marhûn By Murtahin

No	Aspect	Condition	Law/ Provision	Madzhâb
1	The statement of utilizing <i>marhûn</i> by <i>murtahin</i> is put into contract	Stated in contract	Invalid	- Hanafiyyah
		Unstated in contract	Invalid	- Hanafiyyah
			Valid	- Malikiyyah
2	<i>Râhin</i> 's permission	<i>Murtahin</i> has permission from <i>râhin</i>	Valid	- Several Hanafiyyah - Malikiyyah (if caused by selling and buying or such it) - Syafi'iyah (if caused by selling and buying or such it) - Hanabillah (dengan adanya imbalan)
		<i>Murtahin</i> has not permission from <i>râhin</i>	Invalid	- Sebagian hanafiyyah - Malikiyyah (if caused by <i>qardl</i>) - Syafi'iyah (if caused by <i>qardl</i>) - Hanabillah (if caused by <i>qardl</i>)
3	Form/ kind of <i>marhûn</i>	Animal or such it	Valid	- Hanabillah
		Besides animal	Invalid	- Hanabillahs
4	Motive in doing <i>rahn</i> contract	Selling and buying or other exchange contract	Valid	- Malikiyyah - Hanabillah

⁷⁰Abdul Ghofur Anshori, *Gadai Syariah di Indonesia: Konsep Implementasi dan institusionalisasi*, Cet. 2, (Yogyakarta: Gadjah Mada University Press, 2011), p. 118-119.

		<i>Qardl</i> (debt)	Invalid	- Malikiyyah - Hanabillah
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F. The *Murtahin's* Right Against Pawn Stuff (*Marhûn*)

Murtahin's privilege is that status of *murtahinis* more prioritised has more right against the result of selling of *marhûn* the lists of other creditor, until the *murtahin* receives payment of existing debt, either *râhinis* alive or has died. This occurs when *râhin* not only has responsibility to *murtahin*, but he also has a responsibility debt to other person than the *murtahin*. This privilege is assigned to *murtahin* based on the agreement of *fuqahâ*, except Dzahiriyyah scholars, on the basis of the status of the *marhûn* bound with *murtahin*. The presence of *marhûn* as *watsiqah* or guarantees strengthens the existing debt, the *murtahin's* right to hold *marhûn* according to the majority of the Syafi'iyah scholars and prohibition for *râhin* in doing *tasharruf* against *marhûn* except with the permission of *murtahin* according to the consensus view of scholars.

From the other creditor parties do not have the right to protest it and they only deserve to the rest. Because *murtahin* right tied up with stuff that is also tied to the *dzimmah* (responsibility) of *râhin* at once. So *murtahin* is the party that has the material right of *marhûn*, whereas the other creditor parties are bound with the responsibility only, not with the pawned stuff. So therefore, the *murtahin's* rights is stronger position, while their rights only has the quality of *in personal* or individual.⁷¹

G. The End of *Rahn*

⁷¹Yazid Afandi, *Fiqh Muamalah*, p. 217-218.

Actually, there are several causes that make *rahn* contract ends. In this case, not only repayment debt from *râhin* to *murtahin* that makes *rahn* contract ends. The causes make *rahn* contract ends are:

1. Handing *marhûn* over (collateral property) to its owner. According to majority of Syafi'iyah scholars, *rahn* contract is completed and ended with the cession of *marhûn* to its owner. Because *marhûn* is a strengthener guarantee of debts, therefore if *marhûn* turned over to its owner, it is no longer found that the name of strengthener guarantee of debts. Therefore, the existing *rahn* contract is finished and over. Such as, according to the majority, *rahn* contract is completed and ended when *murtahin* lends *marhûn* to *râhin* or to another person with permission of *rahn*.⁷²
2. Debt has been repaid in full. When *rahn* has paid off the entire *marhûn bih*, then *rahn* contract automatically finished and over.⁷³
3. Selling *marhûn* forcibly carried out by *râhin* on order of judge or conducted by a judge when *râhin* refused to sell *marhûn*. When the *marhûn* sold and existing debt repaid with the result of that sale, then *rahn* contract is completed and ended. Whereas if the sale is based on consciousness conducted by the *râhin* on permission of *murtahin*, so if it happens at the debt tempo, then the result of the sale bound to *murtahin*'s right, but if it happens before the tempo of debt payment, the result of sale is bound with *murtahin*'s right.⁷⁴
4. Debt had been released by the *murtahin* with a variety of ways, including by way of *hiwalah* (transfer of debt to another party). *Rahn* contract is

⁷²az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 229.

⁷³az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 229.

⁷⁴az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 229.

considered over with absolving *râhin* from his existing debt although with anyway, although with *hawalah* contract way. Such as, *murtahin* received another pawned stuff as replacement the first pawned stuffs, then *marhûn* considered has been compensated.⁷⁵

5. The pawn has been *fasakh* (cancelled) by *murtahin*, although without *râhin* approval. If cancellation is from *râhin* party, then the pawn still runs and does not cancel. The cancellation of *rahn* contract *murtahin*, according to Hanafiyyah scholars required must be accompanied by a returning *marhûn* to *râhin*. Because *rahn* contract does not apply binding except with *al qabdlu*, then so the cancellation of *rahn* contract should also with *al qabdlu*, i.e. by submitting *marhûn* to *râhin*. According to Malikiyyah, pawn ends with the death of *râhin* before borg received by *murtahin*, or lose of *ahliyatul adâ*, such as bankrupts, insane or ill leading up to the death.⁷⁶
6. The broken of *marhûn* (pawned stuff). The scholars have agreed that a pawn contract could be deleted because of borg (pawned stuff) defective. Action (*tasharruf*) against the borg with renting, granting (*hibah*), or charity (*shadaqah*). If the *râhin* or *murtahin* rents, grants, gives charity, or sell the borg to another party without permission of each party, then the pawn contract ends.⁷⁷
7. Action (*tasharruf*) against the borg with rent, grants, or charity. *Rahn* contract is completed and ended if one of the parties, i.e., *râhin* or *murtahin*, do an action against *marhûn* with lendin it or sell it to others with permission from

⁷⁵az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 229.

⁷⁶az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 229-230.

⁷⁷Mushlich, *Fiqh Muamalah*, p. 313-314.

the another party. Such as, *rahn* contract is also completed and ended when the *murtahin* rents *marhûn* from *râhin* if indeed he renews *qabdlu* on the basis of the rentcontract. Whereas if *marhûn* sold, then the existing *rahn* contract did not complete and end, because the *marhûn* that is sold get areplacement that takes the position as *marhûn*, i.e. the price of the sale result.⁷⁸



⁷⁸az Zuhaili, *Fiqh Islam wa Adillatuhu*, p. 231.



CHAPTER III

RESEARCH RESULT AND DISCUSSION

A. *Rahn* Concept in Compilation of Sharia Economic Law and *Majallah al Ahkâm al ‘Adliyyah*

1. *Rahn* Concept in Compilation of Sharia Economic Law

The appearance of Compilation of Sharia Economic Law starting from the publication of Law No. 3 of 2006 about the changes to the Law No. 7 of 1989 Concerning religious court. The Law No. 3 of 2006 expands the authority of the Religious Court in accordance according to development of law and needs of moslemsin Indonesia at the moment. With the expansion of the authority of religious Courts, now not only authorized to resolve disputes only in the field of marriage, inheritance, will (*wasiat*), grant (*hibah*), endowment (*wakaf*), and charity (*shadaqah*), but also handles about petition for adoption and resolve the

dispute over religious obligatory (*zakat*), *infaq*, and Islamic economy. The relation to this new authority of Religious Court, Article 49 of Law about the religious court modified into:

*“The religious Courts and authorities in charge of checking, disconnect and resolve the matter in the first level, among others, people who are predominantly in the areas of: a. marriage; b. inheritance; c. Will; d. grant (hibah); e. Endowment (wakaf); f. religious obligatory (Zakat); g. Infaq; h. Charity (shadaqah); and i. sharia economy.”*⁷⁹

The explanation of the letter i (economy) in Law No. 3 of 2006 is:

*“The definition of “Islamic economy” is an act or business activities are carried out according to the principles of the Sharia, they are: a. Sharia Bank; b. Microfinance Sharia Institution; c. Sharia Insurance; d. Sharia Reinsurance; e. Sharia Reksadana; f. bond and Midle Period of Sharia Security; g. Sharia Securities; h. Sharia Financing; i. Sharia Pawnshop; j. Sharia financial institution pension funds; and k. Sharia Business”.*⁸⁰

After legalizing Law No. 3 of 2006, then Chairman of the Supreme Court formed a drafting team of KHES based on Decision Letter Number: KMA/097/SK/X/2006 October, 20th2006, presided by Prof. Dr. H. Abdul Manan, SH., S.I.P., M. Hum. The task of the team in General was convening and processing of materials that was necessary, arranged the draft of manuscript, held discussions and seminar that learned attending the review draft of the manuscript with the institutions, scholars, and experts, completing the script, and reporting the compilation result to the Chairman of the Supreme Court of the Republic of Indonesia.

⁷⁹Pasal 49 Undang-Undang No. 3 Tahun 2006 Tentang Perubahan Atas Undang-Undang No. 7 Tahun 1989 Tentang Peradilan Agama.

⁸⁰Penjelasan Pasal 49 huruf i Undang-Undang No. 3 Tahun 2006 Tentang Perubahan Atas Undang-Undang No. 7 Tahun 1989 Tentang Peradilan Agama.

The compiling of Compilation of Sharia Economic Law , particularly in chapter XIV of *Rahn* could be described as follows:

Table 3: Substance of Rahn Contract in KHES

No	Contains of Chapter XIV of Rahn	Substance on Chapter XIV of Rahn
1	Part I	Pillars and requirements of <i>rahn</i>
2	Part II	Addition and replacement for pawn property (<i>marhûn</i>)
3	Part III	Cancellation of <i>rahn</i> contract
4	Part IV	<i>Rahn</i> of loan property
5	Part V	Rights and obligations in <i>Rahn</i>
6	Part IV	<i>Râhin</i> and <i>murtahin</i>
7	Part VII	<i>Marhûn</i> 's storage
8	VIII	Sale of pawn property

In the first part about the Pillars and Requirements of *Rahn* consists of four chapters, namely from article 373 to 376. Article 373 consisted of three paragraphs, the first paragraph about the pillars of *Rahn* which consists of *murtahin* (creditor), *râhin* (debtor), *marhûn* (pawn goods/property), *marhûn bih* (debt) and contract (*ijâb* and *qabûl*). Then in the second paragraph, the description of the proposed pledge that occur in Indonesia pawnshop practice which consists of three contract, i.e. *qardl* contract, *rahn* contract, and *ijârah* contract. This is certainly has little different with the concept of *rahn* which are interpreted as a “pawn” in the classical *fiqh*. In the third paragraph of article 373, which explains that the *rahn* contract should be stated in the form of oral, written or gestures.

Furthermore, article 374 has a uniqueness that the parties must have the legal capability but actually the *rahn* contract is *tabarru'* contract in classical *fiqh*, any small child allowed to do so. And article 375, *rahn* contract is valid if *marhûn* has been accepted by *murtahin*. Whereas in article 376 describes the terms

of *marhûn*, that should be valued, could be turned over and should exist in contract process.

In the second part that is about addition and replacement of pawn property consists of four articles that explain about: everything is covered in *marhûn* then it is also included *tomarhûn* (also in pawn); treasures already made *marhûn* can be replaced with other treasures with together deal; the existing debt could be added with the same *marhûn* without exceeding the value of *marhûn*; and a fourth that everything that came out of *marhûn*, as a child of goats and so on is part of origin *marhûn*.

The third section describes the cancellation of *rahn* contract. *Rahn* is contract of guarantee for debt, if the guarantee has not yet been delivered then could still be cancelled. The cancellation of *rahn* contract also can occur from the *râhin* or *murtahin* party. If *murtahin* wishes to cancel the contract *rahn*, then he can cancel by one side, while *râhin* must request approval from the *murtahin* in advance to cancel contract *rahn*. In addition, the *rahn* contract can be cancelled upon agreement of both parties. In case of cancellation of the *rahn* contract, then the *murtahin* still allowed to restrain pawn property until *râhin* paid off debts.

The fourth part in chapter of *Rahn* consists of one article that has 4 paragraphs that describes the pawn property that originated the loan. In principle, the property of others that borrowed must not be pawned unless with the permission of the owner. Specifies permission from the owner of property determines the pawn transaction that absolute or distinctive pawn contract. Therefore, the property owner knows and understands the risk of the pawn contract

shall be made by the person who is borrowing the treasure. And the last verse, as the owner of the property, the true owner of the property is permitted to ask *râhin* to redeem the pawned property and returns it to him.

Whereas, in the Fifth Part, which is about the right and obligation in *Rahn*. The definition of right and obligation are the rights and responsibilities of *râhin* and *murtahin* in general as well as everyone related *torâhin* and *marhûn*. The rights and obligations of the *murtahin* in the KHES are:

Table 4: Rights and Obligations of Murtahin

No	<i>Murtahin's</i> Right	<i>Murtahin's</i> Obligation
1	Restraining <i>marhûn</i>	Lending debt
2	Priority of debt repayment	Keeping <i>marhûn</i>
3	Demanding debt repayment	Repaying the lose <i>marhûn</i> value
4	Selling <i>marhûn</i> if <i>râhin</i> is not able to repay the debt	Giving an information that <i>marhûn</i> is going to be sold
5	Replacing of <i>marhûn</i> cost	

Meanwhile, the rights and obligation of *Râhin* as follow:

Table 5: Rights and Obligations of Râhin

No	<i>Râhin's</i> Right	<i>Râhin's</i> Obligation
1	Getting <i>marhûn</i> back after repayment	Replacement debt
2	Demanding of the lose <i>marhûn</i> value	
3	Receiving the rest of sale result	

In addition, the *rahn* contract is not canceled caused by the death of *râhin* or *murtahin* because the contract could be succeeded by his heir. The heir who can replace *râhin* who died is heir who has legal capability. However, if the heir has no law capability then will be conducted by his guardian. The guardian of the heir can sell pawn property with permission *murtahin* to pay off the existing debt.

In addition, treasures that came from loan also became the discussion in this part, i.e. If the owner dies and has debts that could not be paid with his private wealth, then the *râhin* must redeem *marhûn* soon. However, if the *râhin* is not capable, then the *marhûn* remain in *murtahin*'s hand. Thus, the heir of the giver of treasure made *marhûn* can redeem the treasure by way of paying the *râhin*'s debt.

However, there is also another role of *murtahin* in the case above, i.e. If the heir does not pay off the debt, then the *murtahin* can sell *marhûn* to pay off the debts of the heir. The excess of selling result must be returned to the heir. And if the result of *marhûn* sale is not enough to pay off the debts of *râhin*, then *murtahin* asks *râhin* to pay off his debts.

The sixth section in chapter XIV is about the right of *râhin* and *Murtahin* in borrowing and utilizing *marhûn*. *Marhûn* could be loaned to third party with the agreement of *râhin* and *murtahin*. Whereas in utilizing, is not allowed for *murtahin* to utilize *marhûn* without *râhin*'s permission.

Furthermore, namely about the *marhûn* storage that discussed at the seventh part. Basically, *murtahin* could store *marhûn* by himself or stored on the third party and can be stored on another party if the third party died. The third party power in the pawn treasure storing his role equals with *murtahin*. After being handed over to the third party, then the third party may not give the property to *râhin* or *murtahin* without the permission of the other. The appointment of third party is conducted based on the deal, if *râhin* and *murtahin* do not agree then the

Court may appoint a keeper of pawn treasure. In General, the cost of pawn property storage bound *râhin* unless there is another specified in the contract.

The last part of Chapter XIV is a pawn property sale. Pawn contract is done by having the time or a certain tempo. If the tempo is down and the debt is paid off yet then the pawn giver/*râhin* can represent to the recipient pawn or the depository or the third party to sell the pawn property. The sale is conducted with the mechanism of the giving warning to pawn giver to pay off the debt because it has been overdue. If could not be paid off, then the pawn treasure sold forcibly at sharian auction. The sale result is used to pay off the debt, the cost of financing and unpaid maintenance as well as cost of sale. If there is a surplus from the sale, it must be returned to the pawn giver.

The thing above is conducted with the requirement, if *râhin*'s existence is unknown. If *râhin* is unknown, then the *murtahin* may apply to the Court in order to establish that the pawn recipient may sell pawn property to pay off the giver pawn's debt. In addition, sometimes the storage of pawn property handled by *murtahin* or third party is experiencing a shortage by not maintaining pawn property appropriate to the contract or because of careless, then the concerned party can be demanded for changing the loss and he must be responsible by replacing it.

Overall, the concept of *rahn* contract in KHES has many similarities with the concept of *rahn* contract in *Majallah al Ahkâm al 'Adliyyah*, but the compiling of KHES also has differences caused by opinions are taken. The opinion taken in drafting KHES which make it has differences is by taking the

opinions of scholars majority. The concept of *rahn* in KHES includes: a) pillar and requirement; b) addition and replacement of *marhûn*; c) cancellation of contract; d) *rahn* property loan; e) rights and obligations of *râhin* and *murtahin*; f) borrowing *marhûn*; g) sale of *marhûn*; h) role of a third party; and i) *marhûn*'s costs.

2. Rahn Concept in Majallah al Ahkâm al 'Adliyyah

Majallah al Ahkâm al 'Adliyyah is a form of application of *taqnîn* (codification of law) that appeared during the reign of Abu Ja'far al-Mansur, the Abbasiyah Sovereignty on the initiative of Ibn Muqaffa'. But this idea has not been realized because of refusal of the scholars such as Imam Malik with reason, that the different of scholar opinion in *furu'* case is a positive thing. And as for *Majallah al Ahkâm al 'Adliyyah* recently realized in codification after the reign of Abbasiyah Sovereignty, that is in the reign of Turkey Utsmânî Kingdom.

Majallah al Ahkâm al 'Adliyyah is the first law compilation that is the first civil law (*mu'âmalah*) the Islamic world made by the Government of the Kingdom of Turkey Utsmânî during the reign of Sultan Ghazî Abd al-Azîz Khân al-Utsmânî (1861-1876) in year 1286 H (1865 M) which is then validated and established for the implementation in 1292 H (1871 M) for the whole regions under the rule of Turkey Utsmânî covering virtually the entire continent of Asia, most of Europe and Africa.

One of the topics in *Majallah al Ahkâm al 'Adliyyah* in this research is the Fifth Book of *Rahn*. The Fifth Book talks about the *Rahn* contract consists of introduction and four chapters that describe about *rahn* contract. The introduction

and the four chapters that describe about *rahn* contract have 60 article, namely from article 701 to 761. In the introduction (*muqaddimmah*) describes the understanding of *rahn* contract, namely:

الرهن حيس مال وتوفيقه في مقابلة حق يمكن استفاؤه منه، ويسمى ذلك
المال مرهونا ورهنا

“The *rahn* contract is restraining treasure in the obtaining to a rights (debt) that it is possible to pay off the debt from the guarantee treasure, called *marhûn* or *rahn*.”

Then proceed with some terms in *rahn* contract that used in *Majallah al Ahkâm al ‘Adliyyah*, i.e. *irtihân*, *râhin*, *murtahin* and *‘adl*.

The First Chapter of the Fifth Book about *Rahn* explains about *rahn* contract which are divided into three parts. The first part of the first chapter are the Pillsr of *rahn*. It consists of the two parts of the article, namely article 706 which explains that the *rahn* contract is valid with the presence of *ijâb*, *qabûl* as well as *marhûn* receiving by *murtahin* and then article 707 explains *ijâbqabûl*.

The Second Part of the First Chapter is about terms of legitimation *rahn* contract. *Rahn* contract in this partis described with requirement term of *râhin* and *murtahin* party are who have intelligence without requiring puberty (*bâligh*), so *rahn* contract that conducted by a little boy who is *mumayyiz* is valid. The *marhûn*/guarantee in the *rahn* contract is considered valid provided that the guarantee is valid treasure in selling and buying including tangible, value and can be turned over when the contract. In addition, *marhûn* in *rahn* contract

must be a treasure in responsibility. That is, not the property of the trust, such as deposit.

The Third Part of the First Chapter of the *Rahn* Book describes about addition and replacement of pawn property. In this section explained that everything is covered in pawn property then included into *marhûn*. Such as pawning land, means pawning land with the plant on that land. The property that has been becoming guarantee in *rahn* contract could be replaced with another property. In addition to replacing, the guarantee in *rahn* contract could also be added, this does not make a new contract but only one contract. On the other hand, *râhin* may also ask for additional debt over *marhûn* he gave when the beginning of contract, with condition that it does not exceed the value of the existing *marhûn*. And in the last article, namely article 715, everything that is produced from *marhûn* then be *marhûn* also with origin *marhûn*.

The Second Chapter of the Fifth Book About *Rahn*, describes the *râhin* and *murtahin*. This chapter consists of 6 articles from article 716 to 721. First, the *murtahin* may cancel *rahn* contract by himself without needing permission of the *râhin*, whereas *râhin* is not allowed to cancel the *rahn* contract without the pleasure of *murtahin*. Beside from one side only, the *rahn* contract could also be cancelled through the deal. In addition, there is a condition about *kafâlah*, i.e. *makfûl 'anhu* (the person who guaranteed his debts by other parties) is allowed to pawn property *tokafîl* (debt guarantor). And in another condition, there are also debts consisting of several sources, and in this

case it is possible to use one *marhûn* for all the debts. And in article 721, people who has credit may also take one *marhûn* of two people who owed to him.

Furthermore, it is the Third Chapter of the Fifth Book about *Rahn* explains *marhûn* that divided into two parts. The first part describes the cost of *marhûn*. First, the *murtahin* is obliged to keep *marhûn* by him or by another person he trusts. The cost for property storage both of place cost and guard cost of treasure pawn is a *murtahin*'s responsible. While the cost for *marhûn* in the form of animal feed and its sheperding or yard either the treatment, cleaning and all the cost for good benefit and the existence of the *marhûn* covered by *râhin*. Basically, any costs incurred by *râhin* or *murtahin* without permission of the other party (*râhin* without *murtahin*'s permission or *murtahin* without *râhin*'s permission) then the cost be became charity cost and should not demand to the other party to replace the cost that he funds out.

In the Second Part of the Third Chapter describes *rahn* of loan property. In principle, it is allowed to borrow other people's treasure and pawn it with permission of the goods owner, the property is called "*rahn musta'âr*" (*rahn* of loan property). The pawning that conducted depending on the owner's permission. If the property owner gives absolute permission, then could be pawned by any form. However, if the permission is given with provision by the property owner, then the limitation given by the owner should be implemented, such as the property owner gives permission to *râhin* to pawn borrowed property to a particular party, then it becomes a necessity to implement.

The next is the Fourth Chapter describes the laws of *rahn* contract which is divided into four parts. The first part of the chapter four describes *rahn* provision in general. *Rahn*'s law generally in *Majallah al Ahkâm al 'Adliyyah* is as follows:

- a. *Murtahin* has a right to hold till *marhûn* pay off the debt
- b. *Murtahin* has a privilege to be priority of debt repayment of all creditors from *marhûn* if *râhin* dies
- c. the existence of pawn property does not eliminate the right of *murtahin* to demand debt payment
- d. *Râhin* could ask one *marhûn* if he pays off debt that based on the guarantee of the *marhûn* and the debt that paid off by half could not be reason for taking back *marhûn* which is equivalent to the value of repayment
- e. the owner of loaned property and has been pawned, has a right to ask the pawn giver to redeem pawn treasure and return it to him. If *râhin* is not capable then the loaned property owner should pay *râhin* debt and demand the change afterwards.
- f. *Rahn* contract does not end with the death of *râhin* and *murtahin*.
- g. If *râhin* died then if the heir is already adult he occupies *râhin*'s position, if the heir is still young or be in a far place then the person who is getting a will sells *marhûn* with permission of *murtahin* and pays off the debt.
- h. The owner of loaned property not allowed to take his property before the debt repaid either *râhin* is still alive or dead.

- i. If *râhin* *musta'âr* died in a bankrupt condition, *marhûn* stays on the *murtahin* hand, but if the owner of the loaned property want to sell property, if the property is enough to pay off the debt then could be sold, if does not then it is not allowed without needing to see *murtahin*'s agreement.
- j. If *murtahin* died then the pawn treasure is in the heir's hand
- k. If someone pawns a property for debts of two people, so if the debt to one person is has repaid then the *marhûn* could not to be taken by *râhin* yet.
- l. Any person who takes a guarantee from the person he credits then he shall hold the property until the debt repayment happens
- m. In case of the destruction of *marhûn*, then if the destruction comes from *râhin* side then he be responsible for it, if the destruction comes from the *murtahin* side, it is considered by paying off the debt with the same value over the destruction. And if the other parties (besides the *râhin* and *murtahin*) that damage the *marhûn*, he be responsible of the value, and the damage is being *marhûn* as well.

The Second Part of the Fourth Chapter of the book about *Rahn* explains the role of *râhin* and *murtahin* in *rahn* contract. The role of *râhin* and *murtahin* in *rahn* contract is as follows:

- a. Each Party (either *râhin* or *murtahin*) should not pawning *marhûn* without the other party's permission, if it happens then *rahn* contract is canceled.

- b. If *râhin* pawns *marhûn* to other party with permission of *murtahin*, then the first *rahn* contract is canceled and the second contract is valid.
- c. If *murtahin* pawns *marhûn* with *râhin*'s permission to another party, then the first contract is canceled and the second contract is valid. It is included in the *musta'ârrahn* contract (*rahn* with loaned property)
- d. If *murtahin* sells *marhûn* without the pleasure of *râhin*, then the *râhin* may choose to allow or cancel the contract.
- e. If *râhin* sells *marhûn* without *murtahin*'s pleasure, then the selling contract is canceled and should not disturb the *murtahin*'s restraining against a pawn property. It is also valid if the sale results used to pay off the debts or *murtahin* allows it, then the item is not being *rahn* goods anymore and the sale results that become the *marhûn*. But if *murtahin* still does not permit then the buyer may choose between waiting for completion of *râhin*'s debt paying or to submit the matter to judge to cancel the sale.
- f. *Râhin* could lend *marhûn* with the permission of *murtahin* or in the reverse. But it must be returned to *murtahin* as a *marhûn*.
- g. *Murtahin* could lend *marhûn* to *râhin*, in this form if *râhin* died then *murtahin* be the one that gets priority over the payment of the debt of *marhûn*.
- h. *Murtahin* is prohibited from utilizing the *marhûn* without *râhin*'s permission, however if *râhin* permits then the debt is not reduced caused of utilizing.

- i. *Murtahin* could bring *marhûn* with him in trip if it is safe.

The Third Part of Chapter Four of the Book about *Rahn* explains *marhûn*'s laws that on the fair party. The role of the fair party or a third party that entrusted *marhûn* plays as *murtahin*, this occurs if the *râhin* and *murtahin* requires this in the contract. If *marhûn* has been submitted to the fair party then the third party may not give *marhûn* to *râhin* or *murtahin* in the absence of pleasure from the other party. If he gave it, then he may pull it back and if there is damage then the third party be responsible for it. Then, if the third party who entrusted a pawn treasure, then it may be entrusted to any other party anymore with the agreement of the two parties, if do not agree then judge who determines the next fair party.

The Fourth Part of the Fourth Chapter of the Book about *Rahn* describes the sale of pawn property. Basically, the sale of pawn property based on the permission of the parties, namely *râhin* and *murtahin*. *Râhin* orders *murtahin* to sell *marhûn* when tempo payment is over, and if *râhin* refuses, then judge sells it and pay off the debt. *Murtahin* could be submit to judge to trade off *marhûn* and pay off the debt if *râhin*'s existence is unknown. *Murtahin* who fear of *marhûn* destruction may submit to judge so that the *murtahin* can sell it, and if *murtahin* does not permit to the judge then he be responsible for the risk. *Murtahin* or fair party or besides them became legitimated representative to trade off *marhûn* if it has been overdue. The representative could not be fired by *râhin* or with the death of *râhin* or *murtahin*. People who become representative in sale of *marhûn* then must submit the sale result to *murtahin*, if he refuses then *râhin* be able to force him and if it still does not want to, then judge forces him.

Overall, the concept of *rahn*contract in *Majallah al Ahkâm al ‘Adliyyah* has a lot of commons with the concept of *rahn*contract in KHES. The difference is due to the arrangement of *Majallah al Ahkâm al ‘Adliyyah* depends to Hanafiyyahmadzhâb. The concept that arranged in *Majallah al Ahkâm al ‘Adliyyah* they are: a) pillar and requirement of *rahn*; b) addition and replacement of *marhûn*; c) cancellation of *rahn*contract; d) *rahn* in *kafâlah* contract; e) *marhûn*'s cost; f) *rahn* of loan property; g) rights of *rahîn* and *murtahin*; h) mortgaging, borrowing and selling *marhûn* by *rahîn* and *murtahin*; i) role of *al ‘adl*; and j) sale of *marhûn*).



B. The similarities and Differences of *Rahn* Concept in Compilation of Sharia Economic Law and Majallah al Ahkâm al ‘Adliyyah

1. The Similarities of *Rahn* Concept in Compilation of Sharia Economic Law

In accordance with the legal principle of *Ubi Societas Ibi Ius* which means where there is a community there is law, then the law should be in accordance with the condition and need of the community. With the growing economic of Indonesia society, especially with the development of financial institutions and business sectors labelled Sharia it is necessary the presence of a regulation that became guidelines in carrying out transactions based on Sharia in the society.

In this case, the Supreme Court as judiciary institution as publishes Regulation No. 2 of 2008 About the Compilation of Sharia Economic Law . So, Court judge in the field of religious judicature examines, adjudicate and resolve matters relating to Islamic economy, using KHES as the guideline.

The formulation of KHES until the publication requires process, energy, a lot of resouces and long enough time. The compiler team of KHES formed based on the decision of the Chairman of the Supreme Court Number KMA/097/SK/X/2006 October, 20th 2006. Prof. Dr. H. Abdul Manan, S.H., S. Ip., M. Hum who was the Chairman of the Religion Supreme Court Room of the Republic Indonesia appointed as the Chairman of the team.

From the substances side, KHES which consists of (3) three books, 39 Chapters and 790 Articles is organized by referring to various books of

fiqh including *Majallah al Ahkâm al ‘Adliyyah*, *Fatwas* of National Sharia Council of Indonesia Scholars Board (DSN-MUI) and Regulations of Indonesia Bank.

Majallah al Ahkâm al ‘Adliyyah is a compilation of Islamic law during the time of Ottoman Turkey (Turkey Utsmani). The compilation is the first codification of Islamic law in the world that has been adopted by several countries as a guide in live of Islamic law in that country. And in the discussion of this study, researcher presents a comparison of *rahn* contract Concept between KHES and *Majallah al Ahkâm al ‘Adliyyah*.

At the same side, the KHES and *Majallah al Ahkâm al ‘Adliyyah* have a lot in similarities, because indeed *Majallah al Ahkâm al ‘Adliyyah* used as a reference in formulating of KHES.

Generally, *rahn* contract explained in KHES in chapter XIV consists of 8 (eight) part, whereas the *rahn* contract in *Majallah al Ahkâm al ‘Adliyyah* described in the fifth book, which consists of four (4) chapters. The KHES has similarities with *Majallah al Ahkam al ‘Adliyyah* in General as follows:

Table 6: The Similarities of Rahn Concept

No	Compilation of Sharia Economic Law (KHES)	Majallah al Ahkâm al ‘Adliyyah
1	The Second Part about Addition and Replacement of Pawn (Article 377-380)	The First Chapter, Third Part about addition, replacement of pawn property after contract (Article 711, 712, 714 dan 715).
2	The Third Part about Cancellation of <i>rahn</i> contract (Article 382-384)	The Second Part about <i>Râhin</i> and <i>Murtahin</i> (Pasal 716-718)
3	The Fourth Part about <i>Rahn</i> of Loan Property (Article 385)	The Third Chapter, Second Part about <i>Rahn</i> of Loan Property (Article 726-728), Opening (Article 708) and The Fourth Chapter, The First Part (Article 732)

4	The Fifth Part about Right and obligation in <i>Rahn</i> (Pasal 386-394)	The Fourth Chapter about Provisions of raih Contract, the First Part about Rahn in General Provisions (Article 279- 731 and Article 733- 738 and Article 760)
5	The Sixth Part about Right of <i>Râhin</i> and <i>Murtahin</i>	The Fouth Chapter, the Secong Part about role of <i>Râhin</i> dan <i>Murtahin</i> in <i>rahn</i> (Article 748 and 750)
6	The Seventh part about <i>Marhûn</i> Storage (Article 397-401)	The Fourth Chapter, The Third Part about Provisiona of Pawn Property Under The Third Party Power (Article 653-755) and The Third Chapter, the First Chapter about pawn property's cost Pertama (Article 723 dan 724)
7	The Eighth Part about sale of Pawn Property (Article 402-408)	The Fourth Chapter, the Fouth Part about Sale of Pawn Property (Article 757, 758, 760, 761,) and The Fouth Chapter, The First Part about General Provision of <i>Rahn</i> (Article 401)

The details explanation are as follow:

- a. The Second Part of KHES about Additions and replacement of pawn Property (article 377-380) has some similarities with *Majallah al Ahkâm al 'Adliyyahin* the first chapter of the third part about the addition, replacement pawn property and the addition after the agreement (article, 714 and 711, 712 715).

Concerning to this part, the existing similarities are that everything is included in *marhûn*, then joining to be pawned such as pawning yard, then including the plan in the yard. The *marhûn* has been submitted by *râhin* to *murtahin* could be replaced, beside it, the existing debt could

also be added but without exceeding the value of *marhûn*. On the other hand, everything that produced by *marhûnis* a part of original *marhûn*.

- b. Third Part of KHES about Cancellation of *Rahn* Contract (chapter 382-384) has some similarities with *Majallah al Ahkâm al 'Adliyyah* in the Second Chapter about *Râhin* and *Murtahin* (section 716-718).

This part talking about Cancellation of *Rahn* Contract. That is, if *marhûn* has not been submitted then *rahn* contract can be cancelled. Whereas the *rahn* contract which is running, can also be cancelled. The party could cancel the contract *ismurtahine* even though without *râhin*'s permission, while *râhin* can cancel the *rahn* contract with permission of *murtahin*. In addition, the contract can be cancelled by *rahn* also by both parties. As a consequence, the contract is cancelled *rahn* contract does not eliminate *murtahin*'s rights to hold the property.

- c. The Fourth Section of KHES is about *Rahn* of Loaned Property (section 385) has some similarities with *Majallah al Ahkâm al 'Adliyyah* in the Third Chapter of the Second Part of *Rahn* of Loaned Property (article 726-728), the Introduction (section 708) and the First Part of the Fourth Chapter (chapter 732).

Regarding *torahn* of loaned property, the property could be pawned on permission of the owner. Permission term that given by the property owner whether absolute or distinctive, become the running basis of *rahn* by *râhin*. On the other side, the owner of the property lends his property to be pawned must be *tamyîz*, so he could understand the risks. And as the

real owner of property, the owner of loaned property has a right to ask for *râhin* to redeem pawned property and return it to him.

- d. Fifth part of KHES is about rights and obligations in *Rahn* (article 386-392 and 394) has some similarities with *Majallah al Ahkâm al 'Adliyyah* in the Fourth Chapter about *rahn* contract laws the First Part about *Rahn* Laws in General (article 279-731 and article 733-738).

Rahn is a contract loaning debt with guarantee, thus *murtahin* has a right of restraining *marhûn* until the debt is paid off. The *Murtahin* has a priority right over debt payment of *marhûn* if *râhin* died. In addition, *rahn* is a *murakkab* contract which is derived from the debt contract (*al qardlu*), thus *murtahin* still has a right to ask his creditor *torâhin*.

Râhin that pawns two *marhûn* of two debts can take on of the *marhûns* if he has paid off one of the debts. *Rahn* is one of contracts, therefore *rahn* contract keeps running even though *râhin* has died. *Râhin* who dies could be replaced by his heir, so that his heir has the authority to sell *marhûn* to pay off his debts. In another condition, *râhin* who dies in a bankrupt condition, then the borrowed property for pawning keeps being *marhûn*. The *Marhûn* should not be sold without permission of *râhin* or if *râhin* or his heir want to sell it so do not need to ask for *murtahin*'s permission.

In the other condition, when the owner of loaned property died and his debts are more than his wealth, then *râhin* must redeem debt soon and restore the loan property, but if *râhin* is not capable then the heir of

the loan property owners can redeem the pawn property. However, if the property is not a loan property, then the ownership of *marhûn* goes to the heir if *râhin* died.

- e. The Sixth Part of KHES about *Râhin* and *Murtahin* has some similarities with *Majallah al Ahkâm al 'Adliyyah* in the Fourth Chapter of the Second Part about the role of *Râhin* and *Murtahin* in *rahn* (article 748 and 750)

This section has only two similarities, namely *râhin* and *murtahin* can be agreed in lending *marhûn* to third party and the second thing is that *murtahin* should not utilize *marhûn*.

- f. The Seven of KHES is about *Marhûn* Storage (Chapter 397-401) has some similarities with *Majallah al Ahkâm al 'Adliyyah* in the Fourth Chapter of the Third Part about laws of pawn property in the Third Party's Authority (Article 651-755) and the first part of the Third chapter is about the cost of pawn property (article 723 and 724).

There are some similarities in this part, namely *marhûn* storage could be conducted by *murtahin* or on any third party where the third party has a role as *murtahin*. After a pawn property handed over to the third party, then the third party must maintain and should not give the property to *râhin* or *murtahin* without the permission of one of this part. The appointed third party by *râhin* and *murtahin* could be replaced by other third party, but if *râhin* and *murtahin* are not agree on the next party, then judge can appoint the party who is going to restraining the property.

- g. The Eighth Part of KHES is about sale of Pawn Property (article 402-408) has some similarities with *Majallah al Ahkâm al ‘Adliyyah* in the Fourth Chapter of the Fourth Part about sale of pawn Property (article 757, 758, 760, 761,) and the Fourth Chapter of the First Part about general law of *rahn* contract (article 400).

This part is the last section of *rahn* chapter in both of the law compilation that describes sale of pawn property. That is, the debt that has been overdue in pawn contract makes *râhin* can represent a pawn to the recipient or the depository or the third party to sell a pawn property. The sale is conducted through sharia auction and the sale result is allocated to debt repayment, the cost of storage and maintenance cost have not been paid. But if in a condition of unknown *râhin*'s existence, then after overdue *murtahin* may apply to the Court to establish that the property could be sold to pay off the debt of giver pawn.

The other things in the completion of this contract is the payment of the damages that conducted by *murtahin* or the third party if the goods are damaged or the storage is not appropriate to the contract.

Table 7: Similarity Aspects of Rahn Concept

No	Similarity Aspect	KHES	<i>Majallah al Ahkam al ‘Adliyyah</i>
1	Addition and replacement of <i>marhûn</i>	Article 377-380	Article 711, 712, 714 dan 715
2	Cancellation of <i>rahn</i> contract (cancellation by <i>rahîn</i> , <i>murtahin</i> and though deal way)	Article 382-384	Pasal 716-718
3	<i>Rahn</i> of loan property	Article 385	Article 726-728
4	Right and obligation in <i>rahn</i> contract	Article 386-392	Article 279-731

	(<i>alhabsu</i> , priority right of payment, paying debt, collecting debt, taking one of some <i>marhûns</i> , the role of heirs and the death of loan property owner)	and 394	and 733-738
5	Lending of <i>marhûn</i> through the deal	Article 395-396	Article 748-750
6	<i>Marhûn's storage</i> (by <i>murtahin</i> and the third party (<i>al 'adl</i>))	Article 397-401	Article 653-755 and 723-724
7	Sale of <i>marhûn</i> (Representation of sale by <i>murtahin</i> , alocation of sale result and the unknown third party)	Article 402-408	Article 757,758,760 and 761

2. The Differences of *Rahn* Concept in *Majallah al Ahkâm al 'Adliyyah*

On the other hand, the concept of *rahn* contract Law and Compilation of Sharia Economic and *Majallah al Ahkâm al 'Adliyyah* have some differences:

Table 8: The Differences of *Rahn* Concept

No	Dimention of Differences	Difference	
		Compilation of Sharia Economic Law	<i>Majallah al Ahkâm al 'Adliyyah</i>
1	Pillar of contract	<i>murtahin</i> , <i>râhin</i> , <i>marhûn</i> , <i>marhûn bih</i> dan akad	<i>Ijâbandqabûl</i>
2	The contract that exists in pawn transaction	Pawn trasantion contains 3 (three) contract, they are <i>qardl</i> , <i>rahn</i> , and <i>ijârah</i>	<i>Rahn</i>
3	Requirement of ' <i>âqidain</i>	Capability of Law	Intelligence
4	<i>Marhûn's</i> maintenance cost	<i>Râhin</i>	<i>Râhin</i> or <i>murtahin</i> (depends on <i>marhûn</i>)

The differences explanation of *rahn* concept between The KHES with *Majallah al Ahkâm al 'Adliyyah* are as follow:

a. Pillar of Contract

Pillar of *rahn* transaction in the KHES is *râhin*, *murtahin*, *marhûn*, *marhûn bih* and agreement, while in *Majallah al Ahkâm al 'Adliyyah* pillar *rahn* contract is only agreement, i.e. *ijâb* and *qabûl*. If reviewed of the *rahn* pillars in KHES, the pillars are opinion of majority scholars. According to the majority scholars, the pillars are something that become the determiner of existence or the absence and it is impossible for something that exists unless by the existence the thing. Such as *'âqid* (the party that held the contract) is one of the pillars of contract, because it is not possible for a contract except with the *'âqid*, although *'âqid* excluding part of the contract.

Then, if take a look at the pillars of *rahn* contract in *Majallah al Ahkâm al 'Adliyyah* the pillar in *rahn* contract only deal consists of *ijâb* from *râhin* and *qabûl* from *murtahin*. This is not really a wrong thing, because according to Hanafiyyah scholars, pillar of *rahn* contract is *ijâb* from *râhin* and *qabûl* from *murtahin*, but the *rahn* contract has not been perfect and in binding effect except after the *al qabdlu* (the handover of pawned goods). This difference occurs because according to Hanafiyyah scholars, pillars is something that become part of a thing that the existence of the absence of the thing depends to that thing. Because something that becomes a part of thing, there is one of them becomes determiner of the existence or the absence of that something and there is also that does not has characteristic such it.

b. Requirements of 'Âqidain

Terms parties who make contract in the KHES is law capability. It is different from *aqidain's* terms in *Majallah al Ahkâm al 'Adliyyah* which states that the parties must be intelligence, so that a young child who is *mumayyiz* could conduct *rahn* contract. It is based upon that *rahn* contract is a *tabarru'* contract. The competence of law referred to article 374 of the KHES is an ability to do any acts that is considered legitimate by law. Among subjects of law who have legal capability according to the KHES is a person has reached 18 old (eighteen) years or has ever married or business entity that is corporated or uncorporated that is not declared bankrupt by court decision that has permanent legal force.

Legal capability in the KHES could be justified if it means the pawn contract in Indonesia which has 3 (three) contracts, i.e., *qardl*, *rahn* and *ijârah*. Because *ijârah* contract according to Syafi'iyah and Hanabillah scholars, a person who can conduct a *ijârah* contract is someone who has being *taklif*. Whereas in article 374 of the KHES has not indicatesuch it, because in the article mentioned as follows:

Article 374

"The parties that conduct rahn contract should have legal capability"

Therefore, if written as above then the determination of legal competence, so the law basis should be described. Because this term that published by Hanafiyyah scholars and besides Hanafiyyah scholars does not require that the parties must be *taklif*, so that young children who is

mumayyiz is allowed to *rahn* conduct the contract without need to wait for puberty (classic standard is 15 years) or has ever married.

c. The Contract that Implemented in the Transaction

Rahn that meant as pawn in classical *fiqh* is a pure charity contract (*tabarru'*). The contract has no orientation to profit. Therefore, *rahn* contract which is used in classical *fiqh* transactions is a contract that is considered enough in regulating human transactions in loans that have warranty.

The different thing in classic pawn transactions with contemporary pawn transactions in Indonesia is the use of some contracts. Pawnshop in Indonesia using three (3) contracts in this transaction, namely *qardl*, *rahn* and *ijârah*. This situation occurs because pawnshop in Indonesia has orientation to profit, therefore an *ijtihâd* appears that published by the National Sharia Board of Indonesia Scholars Assembly (DSN-MUI) *Fatwa* No. 92/DSN-MUI/2014 IV/about the Financing following by *Rahn* at the sixth provisions related *Murtahin's* income which read as follows:

“In terms of rahn (dain/marhûn bih) occurs due to loaning money (qardl contract), then Murtahin's income only comes from mu'nah (maintenance services/keeping) over the marhûn that its magnitude should be setted at the moment of contract asujrah in ijârah contract”.

Qardl contract in pawnshop in Indonesia exists in the debt contract, i.e. when *râhin* borrows money to pawnshop. Whereas, *rahn* contract occurs when the guaranting or the submission guarantee by the debtor (*râhin*) to the creditor (pawn shops/*murtahin*). And the implementation of *ijârah* contract is debtor's payment (*râhin*) to pawnshop over the maintenance of *marhûn*.

For *qardl* contract/ debt is a source contract, and *rahn* contract is a followed contract or branche, so that could be called that *rahn* contract indeed is a *murakkab* contract, but the term used in classical *fiqh* does not differentiate between the *qardl* and *rahn* in a pawn contract, because when using *rahn* contract then there is debts elements already. Meanwhile, fo concept of contract *ijârah* which gives an opportunity for the creditor/*murtahin* for reaching advantage of creditor will be discussed at the cost of *marhûn*'s maintenance.

d. *Marhûn*'s Maintenance Costs

Article 401 on the KHES read:

"The pawn Giver be responsible for the cost of storage and maintenance of pawn property, unless there is another determination in the contract".

The article explains that *râhin* be responsible for the maintenance cost of *marhûn*, although excluded by determination on contract. But in general, *râhin* is that bear that cost. This is different with article 723 and 724 of *Majallah al Ahkâm al 'Adliyyah* which mentioned:

Article 723:

المصاريف التي تلزم لحفظ الرهن كأجرة المحل والنظور على المرتهن

"The costs incurred for maintaining pawn property such as place and the guard be murtahin's responsible".

Article 724:

الرهن إن كان حيوانا فعلفه وأجرة راعيه على الراهن وإن كان عقارا فتعميره
وسقيه وتلقيحه وتطهير خرقه وسائر مصارفه التي هي لإصلاح منفعه وبقائه عائدة
على الراهن أيضاً

“Pawn property which is animal form then its feed, its shepherd wage is Râhin’s responsible and dependents if it is in form of house yard then the maintenance, watering, marrying off (the pant), cleaning up its drain and all costs appeared for benefit goodness and the existence of the grounds returned to Râhin as well”.

So in general, the responsible of *marhûn*’s maintenance cost according to article 723 *Majallah al Ahkâm al ‘Adliyyah* is *murtahin*’s responsible. However, in Article 724 also explained that *râhin* also has a duty in financing *marhûn* maintenance cost with the *marhûn* forms which have been described above.

In the concept of classical *fiqh*, according to Hanafiyyah scholars *marhûn*’s maintenance cost becomes *râhin*’s obligation is if something has been pawned in animal, then the food, drink, and shepherd wage become *râhin*’s obligation. While something that being *murtahin*’s obligation and responsible is cost of hiring someone who is hired to keep it or paying place cost that used to put and keep *marhûn*, such as cost of animal cage that used, and cost of warehouse that used to put and keep the *marhûn*.

Meanwhile, the majority of scholars (Malikiyyah, Syafi’iyah and Hanabillah scholars) opine that all of the costs required by *marhûn* become obligation and responsibility of *râhin*, either needed to take care it still intact or required to keep and treat it.

Therefore, even though the KHEs makes *Majallah al Ahkâm al ‘Adliyyah* as a reference, but the KHEs still has its own consideration in the formulation by

referring to classical *fiqh* books, in this case refers to the opinion of scholars majority (Malikiyyah Syafi'iyah and Hanabillah scholars).

That is all the similarities and differences between Compialtion of Sharia Economic Law and *Majallah al Ahkâm al 'Adliyyah*. But beside the similarities and differences, there are some *rahn* concepts exist in *Majallah al Ahkâm al 'Adliyyah* and not found in the KHES or reversely. Among these concepts are as follow:

- a. Article 373 verse (3) at KHES explaining *rahn* contract can be stated in the form of verbal, writing or signal, it does not exist in *Majallah al Ahkâm al 'Adliyyah*. But this is a concept that is not wrong *rahn* concept according to classic *fiqh*.
- b. Article 719-721 in *Majallah al Ahkâm al 'Adliyyah* explains:
 - 1) people who is guaranted in debt can provide guarantee to someone who guarantees him in debt (happens in *kafâlah* contract)
 - 2) two people who have credit can take onemarhûn from a person who owes
 - 3) one person who has credit could take onemarhûn of two people in debt
- c. Article 725 in *Majallah al Ahkâm al 'Adliyyah* explains about all fees financed by *murtahin* or *râhin* without the permission of other parties considered to be donation.
- d. Article 743 until 745 in *Majallah al Ahkâm al 'Adliyyah* which explains the pawned *marhûn* determinations by *râhin* or *murtahin*. *Râhin* or

murtahin who pawns *marhûn* without permission of the other party, the contract is canceled. However, if *râhin* pawns *marhûn* with *murtahin*'s permission then the first *rahn* contract is canceled and the second *rahn* contract is valid. Then, if *murtahin* pawns *marhûn* with *râhin*'s permission, then the first *rahn* contract is canceled and the second *rahn* contract is valid, the contract becomes *rahn* contract of loan property.

- e. Article 746 and 747 in *Majallah al Ahkâm al 'Adliyyah* explains the sales *marhûn* before overdue. If *murtahin* sells *marhûn* without permission from *râhin*, then the *râhin* choose to cancel the contract or allow it. However, if *râhin* sells *marhûn* without *murtahin*'s permission it is canceled. It could be allowed by the term for paying off the debt/*marhûn bih*, so that the sale result becomes *marhûn*. If *murtahin* does not allow, then the *marhûn* buyer can wait debt repayment or litigate to judge.
- f. Article 759 in *Majallah al Ahkâm al 'Adliyyah* that explains, if *murtahin* is afraid *marhûn* will be broken, so he can sell it with judge's permission and the sales result becomes *marhûn*.

That is all the explanation of *rahn* concept in the KHES and *Majallah al Ahkâm al 'Adliyyah*, the similarities, the differences and many terms that explained in the KHES but not mentioned in *Majallah al Ahkâm al 'Adliyyah* and reversely.



CHAPTER IV

CLOSING

A. Conclusion

The result of this research, the researcher finds the concept in KHES and *Majallah al Ahkâm al 'Adliyyah* and the similarities and differences between both of them. According to the statement of problem the researcher would like to conclude as follows:

1. The *rahn* concept developed in KHES is a concept that does not indicate to retrieval of opinion from one *madzhâb* only. Moreover there are several differences with concept of *rahn* in *Majallah al Ahkâm al 'Adliyyah* due to taking majority opinion. While the concept of *rahn* contract arranged in *Majallah al Ahkâm al 'Adliyyah* is a concept by taking the opinion of the Hanafiyyah *madzhâb*. The *Majallah al Ahkâm al 'Adliyyah* as the first

law compilation of civil law (*mu'âmalah*) in the Islamic world made by the Government of the Kingdom of Turkey Utsmânî has many influences in compiling KHES.

The concept that arranged in *Majallah al Ahkâm al 'Adliyyah* they are: a) pillar and requirement of *rahn*; b) addition and replacement of *marhûn*; c) cancellation of *rahn* contract; d) *rahn* in *kafâlah* contract; e) *marhûn*'s cost; f) *rahn* of loan property; g) rights of *rahîn* and *murtahin*; h) mortgaging, borrowing and selling *marhûn* by *rahîn* and *murtahin*; i) role of *al 'adl*; and j) sale of *marhûn*). While, the concept of *rahn* contract that arranged in KHES consist of some concepts, they are: a) pillar and requirement; b) addition and replacement of *marhûn*; c) cancellation of contract; d) *rahn* property loan; e) rights and obligations of *râhin* and *murtahin*; f) borrowing *marhûn*; g) sale of *marhûn*; h) role of a third party; and i) *marhûn*'s costs.

2. On the other side, KHES and *Majallah al Ahkâm al 'Adliyyah* has some similarities in several terms, they are: a) the addition and replacement of *marhûn*; b) cancellation of *rahn* contract (cancellation by *rahîn*, *murtahin* and through the way of deal); c) *rahn* of loan property; d) right and obligation in the *rahn* contract (*al habsu*, rights of payment priority, paying the debt, collecting debts, taking one of *marhûn*, the role of heir, and the death of *rahn* of loan property owner); e) lending *marhûn* through the deal; f) *marhûn*'s storage (by *murtahin* and by a third party (*al 'adl*); and g)

sale of *marhûn* (sale representation by *murtahin*, allocation of sale result and third parties who are not known).

Whereas the differences which exist in KHES and *Majallah al Ahkâm al 'Adliyyah* includes a few things, namely: a) pillars in KHES are *râhin*, *murtahin*, *marhûn*, *marhûn bih* and transaction, while in *Majallah al Ahkâm al 'Adliyyah* the pillar is transaction of *rahn* only, it is *isijâb* and *qabûl*; b) pawn contract in KHES using three (3) contracts in transaction, namely *qardl*, *rahn* and *ijârah* whereas in *Majallah al Ahkâm al 'Adliyyah* only *rahn* contract; c) Terms of *'âqidain* in KHES is capability of law i.e. 18 years old or has ever married while in *Majallah al Ahkâm al 'Adliyyah* *'âqidain* must be intelligence, so that a young children who is *mumayyiz* can conduct *rahn* contract; and d) financing *marhûn* in KHES mentioned that *râhin* is responsible for the *marhûn*'s maintenance costs whereas in *Majallah al Ahkâm al 'Adliyyah* there is a classification.

But beside the similarities and differences, there are some *rahn* concepts exist in *Majallah al Ahkâm al 'Adliyyah* and not found in the KHES or reversely. Among these concepts are as follow: the concept of *rahn* contract that can be stated in the form of verbal, writing or signal, it does not exist in *Majallah al Ahkâm al 'Adliyyah*. While the concepts that exist in *Majallah al Ahkâm al 'Adliyyah* but does not exist in KHES, there are several concepts: guaranteed that happens in *kafâlah* contract; two people who have credit can take one *marhûn* from a person who owes; one person who has credit could take one *marhûn* of two people in debt; all fees

financed by *murtahin* or *râhin* without the permission of other parties considered to be donation; pawned *marhûn* determinations by *râhin* or *murtahin*; sales *marhûn* before overdue; if *murtahin* is afraid *marhûn* will be broken.

B. Recommendation

From the comparison explanation of *rahn* concept between KHES and *Majallah al Ahkâm al 'Adliyyah*, there are a few things that researcher would like to recommend as the following:

1. For Sharia Faculty, especially Sharia Business Law Department of State Islamic University of Maulana Malik Ibrahim, I hope the comparison of Islamic law codification could be more learned in frequency by including to the learning in the Sharia Business Law Department. Because it would make wide of knowledge of codification construction;
2. For the practitioner of sharia business especially for Islamic finance practitioner, I hope they would like to see more about KHES and the other provisions in Indonesia in making their product. I think it would make the product in the line of sharia and profitable;
3. For students of Sharia Business Law Department, I hope this research could be the motivation for them in learning sharia business law and they would like to learn harder than the researcher, because Islamic business is very important in making welfare in the society.

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APPENDIXES

1. The Second Book, Chapter XIV of Compilation of Sharia Economic Law about *Rahn*
2. The Fifth Book of *Majallah al Ahkâm al 'Adliyyah* about *Rahn* Contract





بسم الله الرحمن الرحيم

بعد صورة الخط الهايوني

ليعمل موجود

الكتاب الخامس

في الرهن ويغفل على مقدمة وثلاثة ابواب

المقدمة

في بيان الاصطلاحات المتقدمة المتعلقة بالرهن

﴿ مادة ٢٠١ ﴾ الرهن حين مال وتوثيقه في مقابلة حتى يمكن استيفاء مستوفى ذلك المال مرهوناً ورهنًا

﴿ مادة ٢٠٢ ﴾ الرهن ان أخذ الرهن

﴿ مادة ٢٠٣ ﴾ الرهن هو الذي اعطى للرهن

﴿ مادة ٢٠٤ ﴾ الرهن هو أخذ الرهن

﴿ مادة ٢٠٥ ﴾ العدل هو الذي اتهمه الراهن والرهن وصلاه واودعاه الرهن

الباب الاول

في بيان المسائل المتعلقة بعقد الرهن وينقسم الى ثلاثة فصول

الفصل الاول

في المسائل المتعلقة بركن الرهن

﴿ مادة ٢٠٦ ﴾ يتعقد الرهن بايجاب وقبول من الراهن والرهن لكن ما لم يوجد

القبض لا يتم ولا يلزم فللراهن ان يرجع عن الرهن قبل التسليم

﴿ مادة ٢٠٧ ﴾ ايجاب الرهن وقبوله هو قول الراهن زهنتك هذا الشيء في مقابلة

ديني اولفظ آخر في هذا المال وقول المرهن قبلت او رضيت اولفظ آخر يدل على

الرضى ولا يشترط ايراد لفظ الرهن مثلاً لو اشترى احد شيئاً واعطى للبايع مالا وقال

له ابني هذا المال عندك الى ان اعطيتك ثمن المبيع يكون قد رهن ذلك المال

في زوائد الرهن المتصلة وفي تبديل الرهن وزيادة بعد عقد الرهن ١٠٧

الفصل الثاني

في بيان شروط انعقاد الرهن

- ﴿ مادة ٧٠٨ ﴾ يشترط ان يكون الراهن والمرهن عاقلين ولا يشترط ان يكونا بالعين
 ﴿ مادة ٧٠٩ ﴾ يشترط ان يكون المرهون صالحاً للبيع فيلزم ان يكون موجوداً
 ومالاً متقوماً ومقدور التسليم في وقت الرهن
 ﴿ مادة ٧١٠ ﴾ يشترط ان يكون مقابل الرهن مالاً مضموناً فيجوز اخذ الرهن
 لاجل مال منصوب ولا يصح اخذ الرهن لاجل مال هو امانة

الفصل الثالث

في زوائد الرهن المتصلة وفي تبديل الرهن وزيادة بعد عقد الرهن

- ﴿ مادة ٧١١ ﴾ كما ان المشتعلات الداخلة في البيع بلا ذكر تدخل في الرهن ايضاً
 كذلك لو رهن عرضة تدخل في الرهن اشجارها والثمارها وسائر مفر وساعها ومزروعاتها
 وان لم تذكر صراحة
 ﴿ مادة ٧١٢ ﴾ يجوز تبديل الرهن برهن آخر مثلاً لو رهن احد ساعة في مقابلة
 كذا دراهم دين ثم بعد ذلك لواتي سيف وقال خذ هذا بدل الساعة ورد المرهن الساعة
 واخذ السيف يكون السيف مرهوناً في مقابلة ذلك المبلغ
 ﴿ مادة ٧١٣ ﴾ يجوز ان يزيد الراهن في المرهون بعد العقد يعني يصح علاوه مال
 بان يكون ايضاً رهناً على شيء كان قد رهن حال كون العقد باقياً وهذا الزائد يلتحق
 بأصل العقد يعني كأن العقد كان قد ورد على هذين المالكين ومجموع هذين المالكين
 يكون مرهوناً بالدين القائم حين الزيادة
 ﴿ مادة ٧١٤ ﴾ اذا رهن مال في مقابلة دين نصح زيادة الدين في مقابلة ذلك
 الرهن ايضاً مثلاً لو رهن احد في مقابلة الف قرش ساعة ثم اخذ ايضاً في
 مقابلة ذلك الرهن من الدائن خمسمائة يكون قد رهن الساعة في مقابلة الف وخمسمائة
 ﴿ مادة ٧١٥ ﴾ الزائد الذي يتولد من المرهون يكون مرهوناً مع الاصل

الباب الثاني

في بيان مسائل تتعلق بالراهن والمرهون

- ﴿ مادة ٧١٦ ﴾ المرهون له ان يفسخ الرهن وحده
 ﴿ مادة ٧١٧ ﴾ ليس للراهن فسخ عقد الرهن بدون رضا المرهون
 ﴿ مادة ٧١٨ ﴾ للراهن والمرهون ان يفسخا الرهن باتفاقهما لكن للمرهون
 حسب الرهن وامساكهما ان يمتد في ماله في ذمة الراهن بعد الفسخ
 ﴿ مادة ٧١٩ ﴾ يجوز ان يعطى المكفول عنه رهناً لكفيله
 ﴿ مادة ٧٢٠ ﴾ يجوز ان يأخذ الدائنان من المديون رهناً واحداً سواء كانا
 شريكين في الدين اولا وهذا الرهن يكون مرهوناً في مقابلة مجموع الدينين
 ﴿ مادة ٧٢١ ﴾ يجوز للدائنان ان يأخذ رهناً واحداً في مقابلة دينه الذي على اثنين
 وهذا ايضا يكون مرهوناً في مقابلة مجموع الدينين

الباب الثالث

في بيان المسائل التي تتعلق بالمرهون وينقسم الى فصلين

الفصل الاول

في بيان مؤنة المرهون ومصاريفه

- ﴿ مادة ٧٢٢ ﴾ على المرهون ان يحفظ الرهن بنحوه ومن هو امانة كماله وشريكه وخادمه
 ﴿ مادة ٧٢٣ ﴾ المصاريف التي تلزم لمحافظة الرهن كأجرة المثل والناطور على المرهون
 ﴿ مادة ٧٢٤ ﴾ الرهن ان كان خيراً فله فلفنة واجرة راعيه على الراهن وان كان
 عقاراً فتعبيره وتسيبه وتلججه وتطهير خرقة وسائر مصاريفه التي هي لاصلاح منافعها وبقائها
 حادثة الى الراهن ايضا
 ﴿ مادة ٧٢٥ ﴾ كل من الراهن والمرهون اذا صرف على الرهن ما ليس عليه بدون
 اذن الآخر يكون متبرعاً وليس له ان يطالب الآخر بما صرفه

الفصل الثاني

في الرهن المستعار

﴿مادة ٧٢٦﴾ يجوز ان يستعير احد مال آخر ويرهنه بأذنه ويقال لهذا الرهن المستعار
 ﴿مادة ٧٢٧﴾ ان كان اذن صاحب المال مطلقاً فللمستعير ان يرهنه بأي وجه شاء
 ﴿مادة ٧٢٨﴾ اذا كان اذن صاحب المال مقيداً بان يرهنه في مقابلة كذا دراهم او في مقابلة مال جنسه كذا او عند فلان او في البلدة الفلانية فليس للمستعير ان يرهنه الا على وفق قيده وشرطه

الباب الرابع

في بيان احكام الرهن وينقسم الى اربعة فصول

الفصل الاول

في بيان احكام الرهن العمومية

﴿مادة ٧٢٩﴾ حكم الرهن هو ان يكون للمرهن حق جنسه الى حين فكه وان يكون احق من سائر الغرماء باستيفاء الدين من الرهن اذا توفي الراهن
 ﴿مادة ٧٣٠﴾ لا يكون الرهن مانعاً عن مطالبة الدين والمرهن صلاحية مطالبتوه بعد قبض الرهن ايضاً
 ﴿مادة ٧٣١﴾ اذا اوفى مقداراً من الدين لا يلزم رد مقدار من الرهن الذي هو في مقابلته والمرهن صلاحية حبس مجموع الرهن وامسأكه الى ان يستوفي تمام الدين ولكن لو كان المرهون شئيين وكان تعيين لكل منهما مقدار من الدين اذا ادى مقدار ما تعيين لاحدهما فللراهن تخلص ذلك فقط
 ﴿مادة ٧٣٢﴾ لصاحب الرهن المستعار ان يتاخذ الراهن المشعير لتخليصه وتسليمه اياه واذا كان المستعير عاجزاً عن اداء الدين لقره فللمعير ان يؤدي ذلك الدين ويستخلص ماله من الرهن وله الرجوع بذلك على الراهن
 ﴿مادة ٧٣٣﴾ لا يبطل الرهن بوفاة الراهن والمرتهن
 ﴿مادة ٧٣٤﴾ اذا توفي الراهن فان كان الورثة كباراً قاموا بمقايمة ويلزمهم آداء

الدين من التركة وتخليص الرهن وإن كانوا صغاراً أو كباراً إلا أنهم غائبون عن البلدة
أي م في محل بعيد عنها مدة السفر فالوصي يبيع الرهن بأذن المرهن ويوفي الدين من ثمنه
* مادة ٧٢٥ * ليس للمعير أن يأخذ ماله من المرهن ما لم يؤد الدين الذي هو
في مقابلة الرهن المستعار سواء كان الراهن المستعير حياً أو كان قد مات قبل فك الرهن
* مادة ٧٢٦ * لو توفي الراهن المستعير حال كونه مفلساً مديوناً بقي الرهن
المستعار في يد المرهن على حاله مرهوناً ولكن لا يباع بدون رضی المعير وإذا أراد المعير
بيع الرهن وإيفاء الدين فإن كان ثمنه يفي الدين فيباع من دون نظر إلى رضی المرهن
وإن كان ثمنه لا يفي الدين فلا يباع من دون رضی المرهن

* مادة ٧٢٧ * لو توفي المعير ودينه أزيد من تركته يؤمر الراهن بتأدية دينه
وتخليص الرهن المستعار وإن كان عاجزاً عن تأدية الدين بسبب فقره يبقى ذلك الرهن
المستعار عند المرهن مرهوناً على حاله ولكن لورثة المعير أداء الدين وتخليصه وإذا طالب
غرماء المعير ببيع المرهن فإن كان ثمنه يفي الدين يباع من دون نظر إلى رضی المرهن وإن
كان لا يفي فلا يباع بدون رضاه

* مادة ٧٢٨ * إذا توفي المرهن فالرهن يبقى مرهوناً عند ورثته
* مادة ٧٢٩ * إذا رهن شخص رهناً عند رجلين على دين لما يذمتو فأدى
لأحدهما ماله يذمتوا ليس له استرداد نصف الرهن وما لم يتضها جميع ماله يذمتوا ليس له
تخليص الرهن منها

* مادة ٧٤٠ * من أخذ من مديوني رهناً فله أن يسك الرهن إلى أن يمتو في
جميع ماله من الدين يذمتها

* مادة ٧٤١ * إذا أئلف الراهن الرهن أو عيبه ضمن وكذلك المرهن إذا أئلفه
أو عيبه ينقط من الدين مقدار قيمته

* مادة ٧٤٢ * إذا أئلف الرهن شخص غير الراهن والمرهن ضمن قيمته يوم انلأفوا
وتكون تلك القيمة رهناً عند المرهن

الفصل الثاني

في تصرف الراهن والمرهن في الرهن

* مادة ٧٤٣ * رهن كل واحد من الراهن والمرهن المرهون عند شخص بدون

اذن الاخر باطل
 * مادة ٧٤٤ * اذا رهن الراهن الرهن باذن المرهين عند غيره بصير الرهن الاول
 باطلاً والثاني صحيحاً
 * مادة ٧٤٥ * اذا رهن المرهين الرهن بأذن الراهن عند آخر يبطل الرهن
 الاول ويصح الرهن الثاني ويكون من قبيل الرهن المستعار
 * مادة ٧٤٦ * لو باع المرهين الرهن بدون رضى الراهن يكون الرهن مخيراً
 ان شاء فسخ البيع وان شاء نفذه بالاجارة
 * مادة ٧٤٧ * لو باع الراهن الرهن بدون رضى المرهين لا ينفذ البيع ولا يطرأ
 خلل على حق حبس المرهين ولكن اذا اوفى الدين يكون ذلك البيع نافذاً وكذا اذا
 اجاز المرهين البيع يكون نافذاً ويخرج الرهن من الرهنية ويبقى الدين على حاله ويكون
 ثم المبيع رهناً في مقام المبيع وان لم يجز المرهين البيع فالمشتري يكون مخيراً ان شاء انتظر
 الى ان يفتك الرهن وان شاء رفع الامر الى الحاكم حتى يفسخ البيع
 * مادة ٧٤٨ * لكل من الراهن والمرهين اعادة الرهن باذن صاحبه ولكل منهم
 اعادة الى الرهنية بعد ذلك
 * مادة ٧٤٩ * للمرهين ان يعير الرهن للراهن وبهذه الصورة لو توفي الراهن
 فالمرهين يكون احق بالرهن من سائر غرماء الراهن
 * مادة ٧٥٠ * ليس للمرهين الانتفاع بالرهن بدون اذن الراهن اما اذا اذن
 الراهن وباح الانتفاع فالمرهين استعمال الرهن واخذ ثمره ولبنه ولا يسقط من الدين
 شيء في مقابلة ذلك
 * مادة ٧٥١ * اذا اراد المرهين الذهاب الى بلد آخر فله ان يأخذ الرهن معه
 ان كان الطريق آمناً

الفصل الثالث

في بيان احكام الرهن اللذي هو في يد العدل

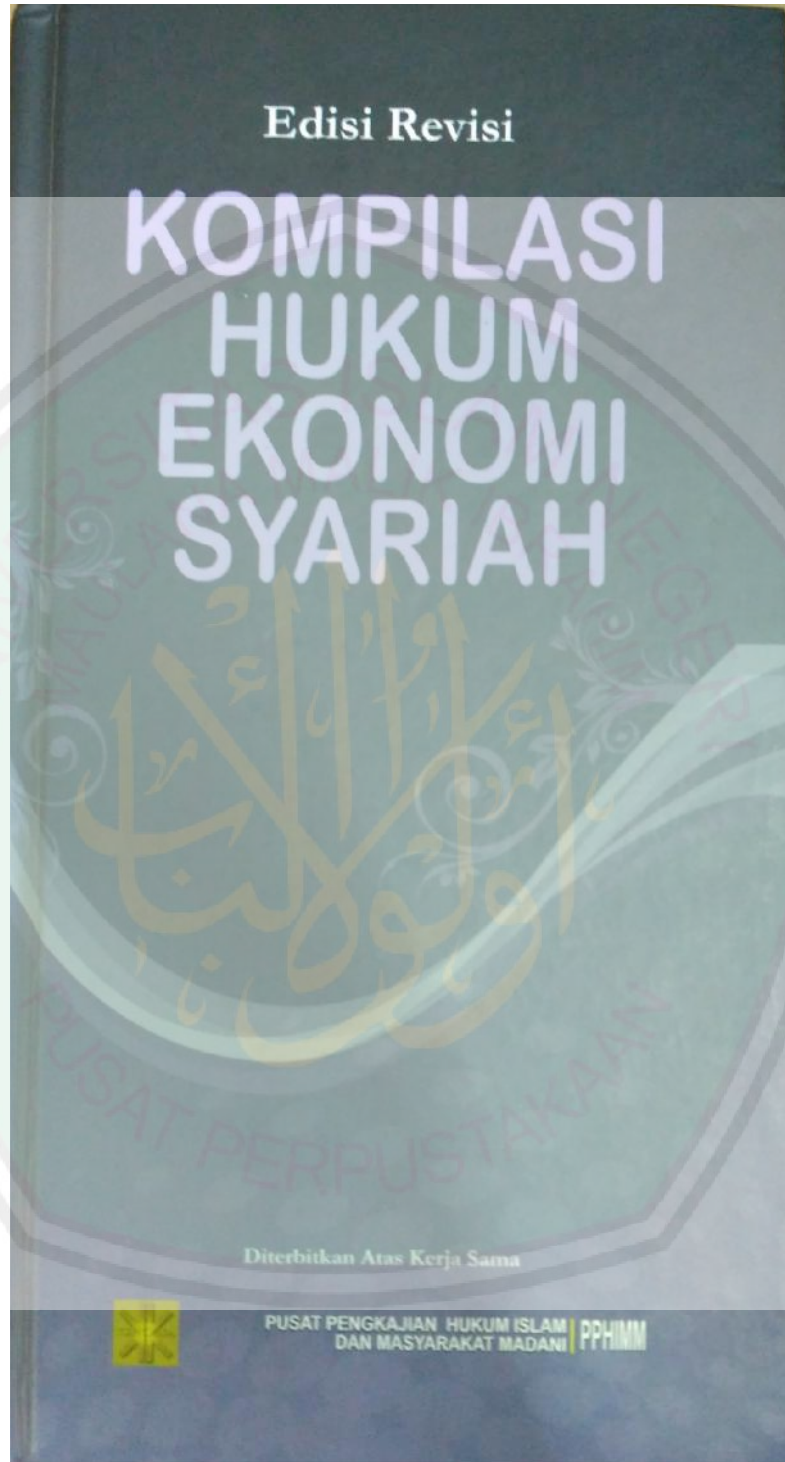
* مادة ٧٥٢ * يد العدل كيد المرهين يعني لو اشترط الراهن والمرهين
 ايداع الرهن عند امين ورضي الامين وقبض الرهن ثم الرهن ولزم وقام ذلك الامين
 بمقام المرهين

﴿ مادة ٧٥٣ ﴾ لو اشترط حين العقد قبض المرهن الرهن ثم وضعه الراهن والمرهن بالاتفاق في يد عدل يجوز
 ﴿ مادة ٧٥٤ ﴾ ليس للعدل أن يعطي الرهن للراهن أو للمرهن بدون رضا الآخر ما دام الدين باقياً وإن اعطاه كان له استرداده وإذا تلف قبل الاسترداد فالعدل يضمن قيمته
 ﴿ مادة ٧٥٥ ﴾ إذا توفي العدل يودع الرهن عند عدل غيره بتراضي الطرفين وإن لم يحصل بينها الاتفاق فالحاكم بضعة في يد عدل

الفصل الرابع

في بيع الرهن

﴿ مادة ٧٥٦ ﴾ ليس لكل من الراهن والمرهن بيع الرهن بدون رضا صاحبه
 ﴿ مادة ٧٥٧ ﴾ إذا حل أجل الدين وامتنع الراهن عن أدائه فالحاكم يأمره ببيع الرهن وإداء الدين فإن أبي وعاند باعه الحاكم وأدى الدين
 ﴿ مادة ٧٥٨ ﴾ إذا كان الراهن غائباً ولم تعلم حياته ولا ماله فالمرهن يراجع الحاكم على أن يبيع الرهن ويستوفي الدين
 ﴿ مادة ٧٥٩ ﴾ إذا خيف فسه الرهن فالمرهن يبيعه وأبقاء ثمنه رهناً في يده بأذن الحاكم وإذا باعه بدون إذن الحاكم يكون ضامناً كذلك لو أدرك ثمر البستان المرهون وخضرته وخيف تلفه فليس للمرهن بيعه إلا بأذن الحاكم وإن باعه بدون إذن الحاكم يضمن
 ﴿ مادة ٧٦٠ ﴾ إذا حل وقت أداء الدين يصح توكيل الراهن المرهن أو العدل أو غيرها ببيع الرهن وليس للراهن عزل ذلك الوكيل بعد ولا ينعزل بوفاء الراهن والمرهن أيضاً
 ﴿ مادة ٧٦١ ﴾ الوكيل يبيع الرهن ببيع الرهن إذا حل أجل الدين وبسلم ثمنه إلى المرهن فإن أبي الوكيل يبيع الراهن على يمينه وإذا أبي وعاند الراهن أيضاً باعه الحاكم وإذا كان الراهن أو ورثته غائبين يبيع الوكيل على بيع الرهن فإن عاند باعه الحاكم
 نهربراً في ١٤ محرم سنة ١٢٨٨



BAB XIV

RAHN

Bagian Pertama Rukun dan Syarat *Rahn*

Pasal 373

- (1) Rukun akad *rahn* terdiri dari: *murtahin*, *murtahin*, *marhun*, *marhun bih/ utang*, dan akad
- (2) Dalam akad gadai terdapat 3 (tiga) akad paralel, yaitu: *qardh*, *rahn*, dan *ijarah*

Pasal 374

Para pihak yang melakukan akad gadai harus memiliki kecakapan hukum.

Pasal 375

Akad *rahn* sempurna bila *marhun* telah diterima oleh *murtahin*.

Pasal 376

- (1) *Marhun* harus bernilai dan dapat diserahkan-terimakan.
- (2) *Marhun* harus ada ketika akad dibuat.

Bagian Kedua Penambahan dan Penggantian Harta *Rahn*

Pasal 377

Segala sesuatu yang termasuk dalam *marhun*, maka turut digadaikan pula.

Pasal 378

Marhun dapat diganti dengan *marhun* yang lain berdasarkan kesepakatan kedua belah pihak.

Pasal 379

Marhun bih/utang yang dijamin dengan *marhun* bisa ditambah secara sah dengan jaminan *marhun* yang sama.

Pasal 380

Setiap tambahan dari *marhun* merupakan bagian dari *marhun* asal.

Bagian Ketiga**Pembatalan Akad *Rahn*****Pasal 381**

Akad *rahn* dapat dibatalkan apabila *marhun* belum diterima oleh *murtahin*.

Pasal 382

Murtahin dengan kehendak sendiri dapat membatalkan akadnya.

Pasal 383

- (1) *Rahin* tidak dapat membatalkan akad *rahn* tanpa persetujuan *murtahin*.
- (2) *Rahin* dan *murtahin* dapat membatalkan akad *rahn* dengan kesepakatan.

Pasal 384

Murtahin boleh menahan *marhun* setelah pembatalan akad sampai *marhun* *bih*/utang yang dijamin oleh *marhun* itu dibayar lunas.

Bagian Keempat***Rahn* Harta Pinjaman****Pasal 385**

- (1) Pada prinsipnya harta pinjaman tidak boleh digadaikan kecuali dengan seizin pemiliknya.
- (2) Apabila pemilik harta memberi izin secara mutlak maka peminjam boleh menggadaikannya secara mutlak; dan apabila pemilik harta memberi izin secara terbatas maka peminjam harus menggadaikannya secara terbatas.
- (3) Pemilik harta yang mengizinkan hartanya dijadikan jaminan dalam *rahn* harus mengetahui dan memahami resikonya.

- (4) Pemilik harta yang dipinjamkan dan telah digadaikan, mempunyai hak untuk meminta kepada pemberi gadai guna menebus harta gadai serta mengembalikan kepadanya.

Bagian Kelima **Hak dan Kewajiban dalam *Rahn***

Pasal 386

- (1) *Murtahin* mempunyai hak menahan *marhun* sampai *marhun bih*/utang dibayar lunas.
- (2) Apabilarahin meninggal, maka *murtahin* mempunyai hak istimewa dari pihak-pihak yang lain dan boleh mendapat pembayaran utang.

Pasal 387

Adanya *marhun* tidak menghilangkan hak *murtahin* untuk menuntut pembayaran utang.

Pasal 388

Rahin dapat menuntut salah satu *marhun* apabila telah membayar lunas utang yang didasarkan atas jaminan *marhun* tersebut.

Pasal 389

Akad *rahn* tidak batal karena *rahin* atau *murtahin* meninggal.

Pasal 390

- (1) Ahli waris yang memiliki kecakapan hukum dapat menggantikan *rahin* yang meninggal.
- (2) Perbuatan ahli waris dari *rahin* yang tidak cakap hukum dilakukan oleh walinya.
- (3) Wali sebagaimana yang dimaksud dalam ayat (2) dapat menjualharta gadai setelah mendapat izin dari *murtahin* untuk melunasi utang.

Pasal 391

- (1) Apabila *rahin* meninggal dunia dalam keadaan pailit, pinjaman tersebut tetap berada dalam status *marhun*.

- (2) *Marhun* sebagaimana dimaksud pada ayat (1) di atas tidak boleh dijual tanpa persetujuan *rahin*.
- (3) Apabila *rahin* bermaksud menjual *marhun* sebagaimana dimaksud dalam ayat (1), *marhun* harus dijual meskipun tanpa persetujuan *murtahin*.

Pasal 392

- (1) Apabila memberi pinjaman harta yang digadaikan meninggal dunia dan utangnya lebih besar dari kekayaannya, maka *rahin* harus segera membayar utang/ menebus *marhun* yang telah dipinjam dari yang meninggal.
- (2) Apabila *rahin* sebagaimana dimaksud dalam Ayat (1) tidak mampu membayar utang /menebus *marhun*, maka harta yang dipinjamnya/ *marhun* akan terus dalam status sebagai *marhun* dalam kekuasaan *murtahin*.
- (3) Ahli waris dari pemberi pinjaman harta yang dijadikan *marhun* dapat menebus harta itu dengan cara membayar utang *rahin*.

Pasal 393

- (1) Apabila ahli waris *rahin* tidak melunasi utang pewaris/ *rahin*, maka *murtahin* dapat menjual *marhun* untuk melunasi utang pewaris.
- (2) Apabila hasil penjualan *marhun* melebihi jumlah utang *rahin*, maka kelebihan tersebut harus dikembalikan kepada ahli waris *rahin*.
- (3) Apabila hasil penjualan *marhun* tidak cukup untuk melunasi utang *rahin*, maka *murtahin* berhak menuntut pelunasan utang tersebut kepada ahli warisnya.

Pasal 394

Kepemilikan *marhun* beralih kepada ahli waris apabila *rahin* meninggal.

Bagian Keenam Hak *Rahin* dan *Murtahin*

Pasal 395

Rahin dan *murtahin* dapat melakukan kesepakatan untuk meminjamkan *marhun* kepada pihak ketiga.

Pasal 396

Murtahin tidak boleh memanfaatkan *marhun* tanpa izin *rahin*.

Bagian Ketujuh
Penyimpanan *Marhun***Pasal 397**

Murtahin dapat menyimpan sendiri *marhun* atau pada pihak ketiga.

Pasal 398

Kekuasaan penyimpanan harta gadai sama dengan kekuasaan penerima gadai.

Pasal 399

Penyimpan harta gadai tidak boleh menyerahkan harta tersebut baik kepada pemberi gadai maupun kepada penerima gadai tanpa izin dari salah satu pihak.

Pasal 400

- (1) Harta gadai dapat dititipkan kepada penyimpan yang lain jika penyimpan yang pertama meninggal, dengan persetujuan pemberi dan penerima gadai.
- (2) Pengadilan dapat menunjuk penyimpan *marhun* jika pemberi dan penerima gadai tidak sepakat.

Pasal 401

Pemberi gadai bertanggung jawab atas biaya penyimpanan dan pemeliharaan harta gadai, kecuali ditentukan lain dalam akad.

Bagian Kedelapan
Penjualan Harta *Rahn***Pasal 402**

Apabila telah jatuh tempo, pemberi gadai dapat mewakilkan kepada penerima gadai atau penyimpan atau pihak ketiga untuk menjual harta gadainya.

Pasal 403

- (1) Apabila jatuh tempo, penerima gadai harus memperingatkan pemberi gadai untuk segera melunasi utangnya.
- (2) Apabila *rahin* tidak dapat melunasi utangnya maka *marhun* dijual paksa melalui lelang syariah.
- (3) Hasil penjualan harta gadai digunakan untuk melunasi utang, biaya penyimpanan dan pemeliharaan yang belum dibayar serta biaya penjualan.
- (4) Kelebihan hasil penjualan menjadi milik pemberi gadai dan kekurangannya menjadi kewajiban *rahin*.

Pasal 404

Jika pemberi gadai tidak diketahui keberadaannya, maka penerima gadai boleh mengajukan kepada pengadilan agar pengadilan menetapkan bahwa penerima gadai boleh menjual harta gadai untuk melunasi utang pemberi gadai.

Pasal 405

Jika penerima gadai tidak menyimpan dan/ataumemelihara harta gadai sesuai dengan akad, maka pemberi gadai dapat menuntut ganti rugi.

Pasal 406

Apabila harta gadai rusak karena kelalaiannya, penerima gadai harus mengganti harta gadai.

Pasal 407

Apabila yang merusak harta gadai adalah pihak ketiga, maka yang bersangkutan harus menggantinya.

Pasal 408

Penyimpan harta gadai harus mengganti kerugian jika harta gadai itu rusak karena kelalaiannya.

CURRICULUM VITAE

A. Data Pribadi

Nama : Muh Mansyur
Tempat, Tanggal Lahir : Bogor, 03 Februari 1993
Jenis Kelamin : Laki-laki
Agama : Islam
Alamat : Jl. H. Edi Sukma N0. 5 Rt. 05 Rw. 01 Kp. Tenggek Desa
Cimande Hilir Kec. Caringin Kab. Bogor- Jawa Barat
No. Hp : 085815129537
Email : mansyurani4@gmail.com

B. Latar Belakang Pendidikan

1. Pendidikan Formal

No	Lembaga Pendidikan	Tahun Lulus
1	SDN Caringin I	2005
2	MTs Al Ashriyyah Nurul Iman	2009
3	SMA Al Ashriyyah Nurul Iman	2012
4	UIN Maulana Malik Ibrahim Malang	2017

2. Pendidikan Non-Formal

No	Instansi	Tahun
1	Pondok Pesantren Al Ashriyyah Nurul Iman	2005-2012

C. Pengalaman Organisasi

1. OSIS SMA al Ashriyyah Nurul Iman
2. Pengurus Harian Pondok Pesantren al Ashriyyah Nurul Iman
3. SESCOM (Sharia Economy Student Community) UIN Malang
4. Musyrif Pusat Mahad al Jamiah UIN Malang
5. CSSMoRA UIN Malang

D. Pretasi-prestasi

1. Juara Harapan 2 Lomba Baca Kitab Provinsi Jawa barat Tahun 2011
2. Juara 3 Lomba Debat Hukum Islam tingkat Jawa Timur tahun 2014